

RCRA Citizen Suits No Longer Option In Regulating Diesel

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Not persuaded by plaintiffs' concerns over a purported gap in the federal regulation of diesel railyard emissions as indirect sources in the Clean Air Act, the Ninth Circuit held in *Center for Community Action and Environmental Justice v. BNSF Railway Co.* that any such gap could not be filled by citizen suit enforcement under the Resource Conservation and Recovery Act.

Looking to the text of RCRA, the Ninth Circuit determined that emissions of the small solid particles found in diesel exhaust cannot be challenged in a RCRA citizen suit because those particles are emitted into the air rather than placed on land or water as required by the statute's definition of disposal. The ruling is broad and has potential implications for all diesel exhaust emitters — it may even serve to foreclose future RCRA citizen suit challenges to air emissions beyond diesel.



Kirsten L. Nathanson

Background

Plaintiff groups Center for Community Action and Environmental Justice, East Yard Communities for Environmental Justice and Natural Resources Defense Council filed suit under RCRA's citizen suit provision[1] in the U.S. District Court for the Central District of California in 2011, alleging that diesel particulate matter 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 the RCRA. Members of plaintiffs' groups live in the vicinity of defendants' railyards and relied upon determinations by the California Air Resources Board and the U.S. Environmental Protection Agency that DPM is likely to be carcinogenic to humans.

According to plaintiffs, defendants' railyards collectively emitted over 160 tons of DPM into the air in 2005. In their complaint, plaintiffs asserted 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 such as railyards. Plaintiffs further contended that DPM is subject to regulation under the RCRA because, although the particulate matter in diesel exhaust is initially transported through the air in a gaseous form, it nevertheless should be treated as a solid or hazardous waste under the RCRA because the gas consists of solid particles that may eventually settle onto water and land.

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." [2] Importantly, although Congress expressly authorized federal CAA indirect source regulation in some circumstances, it did not authorize such regulation with respect to railyards. The district court saw any potential regulatory gap as minimal at best because the CAA allows California to adopt emissions standards for nonroad engines and vehicles other than new locomotive engines and allows the state to regulate indirect sources of air pollution. In addition, every direct source of DPM in the railyards is regulated by the CAA even though the railyards themselves are not.

The district court also held that, even if there was no conflict between the two statutes, dismissal was warranted because DPM is not a "solid or hazardous waste" subject to RCRA regulation. The court interpreted RCRA's definition of solid waste to include contained gaseous material, not uncontained gases like DPM. If DPM could be considered solid waste, then any gas that contained compounds, no matter how small, that could be aggregated to form a solid or liquid would be subject to RCRA regulation. Because the CAA addresses the hazards from every compound found in DPM, the court likened the CAA to a scalpel that Congress gave the EPA to "address the problem of DPM with precision." Congress, however, did not intend for courts to step in to regulate DPM by "wielding [the] RCRA like a sledgehammer." [3] In other words, because Congress and the EPA have created complex regulatory schemes applicable to diesel exhaust under the CAA, the court held that diesel exhaust was not subject to regulation under the more general provisions in RCRA.

Ninth Circuit Ruling

On appeal, a unanimous three-judge panel of the Ninth Circuit affirmed the district court's dismissal, but on different grounds — relying on RCRA's definition of disposal. [4] 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." [5] That definition does not include the act of emitting and on its face includes only conduct that results in the placement of solid waste "into or on any land or water." 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 panel determined that the RCRA's "'disposal' occurs where the solid waste is first placed 'into or on any land or water' and is thereafter 'emitted into the air.'" [6]

The alleged solid waste at issue in this case — diesel particulate matter — does not fall within the RCRA's definition of disposal because it was emitted into the air (it was not first placed onto land or water). 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 as a court cannot do." [7] In addition, because other provisions of RCRA do include the act of emitting, such as the definition of release, the court found that Congress knew how to define disposal to include emissions but chose not to.

The court rejected plaintiffs' invitation to glean Congress' intent that air emissions be regulated under RCRA from Section 7002, which empowers the 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. 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 [the] 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." [8]

Finally, the court examined the legislative history of both the CAA and RCRA to foreclose the possibility that the statute's definition of disposal could later be deemed ambiguous. The court concluded that the regulation of locomotives and locomotive engines was given exclusively to the EPA, while the regulation of railyards, as indirect sources of air pollution, was expressly, albeit permissively, left to the states. Importantly, the RCRA does not apply to either. Instead, the 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.

Analysis and Implications

The Ninth Circuit's decision is the first time an appellate court has ruled on whether a RCRA citizen suit may be used to challenge diesel particulate matter, and it firmly forecloses citizen groups' attempts to expand the reach of the statute to diesel emissions in that circuit. Although plaintiffs may pursue their theory in other jurisdictions, the Ninth Circuit's clear textual analysis of RCRA should serve as a useful tool against those suits.

In addition, emitters of diesel exhaust may now rely on the district court's well-reasoned opinion in seeking to dismiss similar RCRA challenges in the future. The district court dismissed this case on alternative, but equally valid grounds, relying on the conflict between the CAA and RCRA as well as the latter's definition of solid waste. The Ninth Circuit did not disturb the district court's holdings on appeal, but took an alternative tack in analyzing the statute's definition of disposal. Thus, taken together, these rulings provide diesel exhaust emitters multiple bases to try to defeat RCRA citizen suits attempting to extend the reach of that statute to DPM.

Finally, this case has wide-ranging implications for all emitters of air pollution and citizen plaintiffs seeking to fill any perceived gaps in federal CAA regulation using RCRA's citizen suit provision. Because the Ninth Circuit grounded its ruling firmly in the statute's definition of disposal, rather than on any specific properties of DPM or the regulation of diesel exhaust more generally, the rationale underlying the court's rejection of RCRA regulation of DPM emissions may apply with equal force to any type of emissions that are emitted directly into the air rather than onto land or water.

—By Kirsten L. Nathanson, David Y. Chung and Sherrie A. Armstrong, Crowell & Moring LLP

Kirsten Nathanson is a partner, David Chung is counsel and Sherrie Armstrong is an associate in Crowell & Moring's Washington, D.C. office.

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[1] 42 U.S.C. § 6972(a)(1)(B).

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

[3] Id. at *7.

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

[5] 42 U.S.C. § 6903(3).

[6] Ctr. for Cmty. Action, 2014 WL 4085860, at * 4.

[7] Id.

[8] Id. at *5.