

# Reach of Citizen Suits Brought Under RCRA Uncertain

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The Resource Conservation and Recovery Act (RCRA) is the principal federal statute governing the management of solid waste. Designed as a comprehensive system regulating hazardous and other solid wastes "from cradle to grave," RCRA establishes a permitting system for hazardous waste treatment, storage and disposal facilities and imposes other regulatory standards and requirements that govern waste management activities nationwide.

Like most other modern federal environmental statutes, RCRA supplements the enforcement powers of the U.S. Environmental Protection Agency (EPA) with a citizen suit provision authorizing private citizens to bring RCRA enforcement actions for violation of any permit, regulation or standard. Significantly, in the 1984 amendments to RCRA, Congress also authorized citizen suits against any person "who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Despite decades of administrative and judicial interpretations of RCRA, elements of an RCRA citizen suit, including "solid waste," "disposal" and an "imminent and substantial endangerment to health or the environment," remain poorly defined. Two recent decisions involving particulate matter disbursed through the air illustrate the uncertainty regarding RCRA's breadth.

In *Center for Community Action and Environmental Justice v. BNSF Railway*, 764 F.3d 1019 (9th Cir. 2014), members of various environmental organizations living near railyards commenced an RCRA citizen suit alleging that they suffered increased risk of cancer and other diseases as a result of breathing particulates in diesel exhaust emitted at the railyards. The plaintiffs alleged that the particulates contained in diesel exhaust fell from the air onto nearby land and water then re-entrained into the air. The U.S. Court of Appeals for the Ninth Circuit focused on whether this scenario constituted "disposal" under RCRA.

RCRA defines disposal as the placing of any solid or hazardous waste into or on any land or water so that it may enter the environment or be emitted into the air or discharged into any waters. The Ninth Circuit acknowledged that this definition does not plainly state whether "disposal" includes emissions directly into the air that are thereafter deposited onto land or water. The court found significant, however, that the definition does not include the act of "emitting"; emissions are mentioned only when they follow placement of solid waste onto land or water. The court concluded that "disposal" occurs when the solid waste is first placed into land or water and then emitted into the air, not when a facility emits particulate matter directly into the air.

The Ninth Circuit based its conclusion not only on the statutory language, but also on the legislative histories of the Clean Air Act and RCRA. In 1977, Congress amended the Clean Air Act to prohibit the EPA from regulating indirect sources such as railyards. In 1984, Congress enacted the hazardous and solid waste amendments to RCRA that, among other things, regulated air emissions only from hazardous waste treatment, storage and disposal facilities. Emissions from railyards fell into the gap in coverage of the Clean Air Act and RCRA.

The plaintiffs contended that RCRA's citizen suit provision is designed to fill gaps in coverage where solid waste activities create an imminent and substantial endangerment. The Ninth Circuit disagreed, concluding that Congress deliberately left regulation of indirect sources to the states. The Ninth Circuit affirmed the dismissal of the citizen suit on the ground that the plaintiffs' RCRA claim was improperly based on "emissions" that did not constitute "disposal."

A similar dispute over the reach of RCRA's citizen suit provision produced a different outcome in *The Little Hocking Water Association v. E.I. du Pont de Nemours & Co.*, 2015 U.S. Dist. LEXIS 29200 (S.D. Ohio 2015). The Little Hocking Water Association contended that its public water supply wellfield had been contaminated by perfluorooctanoic acid (PFOA) and other perfluorinated compounds used by E.I. du Pont de Nemours & Co. in the production of non-stick coating products. DuPont discharged these compounds to the Ohio River and also emitted them to the air during manufacturing at its Washington Works Facility in West Virginia.

DuPont did not dispute that its air emissions impacted Little Hocking's wellfield, located across the Ohio River approximately one-quarter mile from the facility. Rather, in its motion for summary judgment, DuPont contested that its air emissions constituted a "disposal" under RCRA. DuPont also contended that it had entered into administrative orders on consent (AOCs) that had the effect of barring Little Hocking's citizen suit, that its water discharges affecting the wellfield were regulated by the Clean Water Act but not by RCRA, and that the operation and maintenance of a water treatment plant that reduced the PFOA to undetectable levels eliminated any substantial endangerment to health or the environment.

The court summarily rejected DuPont's arguments that the administrative orders and other statutes precluded the RCRA claim. The court reasoned that Little Hocking had incurred harm and sought relief beyond the scope of the AOCs, and the AOCs did not qualify under 42 U.S.C. Section 6972(b)(2)(A)-(C) as orders barring RCRA citizen suits.

Likewise, RCRA's exemption for activities regulated under the Clean Water Act did not apply because at least some discharges consisted of unregulated stormwater runoff from contaminated soil and buildings outside the ambit of the Clean Water Act's permitting program. These unregulated discharges may have contributed to contamination of the wellfield.

To determine whether air emissions of PFOA constituted "disposal" within the meaning of RCRA, the court looked to both the statutory language and legislative history. The court emphasized that as a remedial statute, RCRA should be interpreted broadly. The court found that an emission to air that falls to the ground and contaminates land or water is as much a disposal as a deposit directly onto the land or water. Both result in soil and groundwater contamination that RCRA is designed to prevent. The court distinguished the case from *BNSF* where the plaintiffs

contended that they were injured as a result of poor air quality caused by railyard emissions. In the court's view, no regulatory gap exists with respect to air emissions from a manufacturing facility that caused contamination of nearby land and water; RCRA covers these emissions.

After determining that a "disposal" occurred, the court also concluded that Little Hocking has produced sufficient evidence that the PFOA on its property may present an imminent and substantial endangerment to the environment. Health was not currently impacted because the treatment system funded by DuPont successfully removes PFOA from all of the water supplied from Little Hocking's wellfield. In contrast, an imminent and substantial endangerment to the environment may exist because plants and animals on the wellfield may be exposed to harmful concentrations of PFOA.

Although the *Little Hocking* court attempted to distinguish *BNSF*, its holding is incompatible with *BNSF*'s conclusion that RCRA does not cover emissions from a facility directly into the air. *BNSF*'s holding has the benefit of creating a clear decision point on whether RCRA applies: a material that is not within RCRA's purview at the time of its emission to the air cannot later become subject to RCRA when it falls onto land or water. On the other hand, *Little Hocking*'s holding provides citizens with a powerful tool to remediate an imminent and substantial endangerment caused by air emissions affecting land and water.

The persuasiveness of *Little Hocking*'s rationale may depend on whether imposing responsibility on generators for air emissions is compatible with RCRA's comprehensive waste management regime. RCRA's existing air emission control requirements applicable to hazardous waste treatment, storage and disposal facilities make it at least plausible that emissions can be brought within the current regulatory regime. Nevertheless, courts adopting the *Little Hocking* court's approach will face the difficult task of clarifying how a broad reading of "disposal" affects a generator's responsibilities under RCRA.

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