Particulate Matter, Aerial Emissions, and Liability Under RCRA and CERCLA

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As every environmental practitioner knows, there are few laws whose text is subject to as much legal scrutiny and judicial interpretation as the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6001, *et seq*., and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq*. Unfortunately, and notwithstanding the fact that the resulting abundance of judicial opinions would – at least in theory – offer clarity and guidance on the application of CERCLA and RCRA, there are few laws which continue to generate as much uncertainty among environmental litigants, in large part because of the complexity and oftentimes inconsistent nature of those rulings.

Three recent decisions from federal courts in California, Ohio, and Washington have considered the novel issue of whether aerial emissions of particulate matter can constitute a "disposal" under CERCLA and result in arranger liability, or an actionable "disposal" under RCRA. Depending upon how these issues are resolved by the appellate courts, they may not only expand but further complicate the already broad scope of RCRA and CERCLA liability.

Liability Under CERCLA and RCRA

Congress enacted RCRA in 1976 to provide a comprehensive regulatory program for the active management of hazardous wastes from the point of generation to their ultimate disposal. Chicago v. Environmental Defense Fund, 511 U.S. 328, 331 (1994) (noting RCRA was enacted as a means to "regulate hazardous wastes from cradle to grave"). Consistent with this broad mandate, RCRA contains a citizen suit provision under which private individuals may sue "any person . . . who has contributed or who 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." 42 U.S.C. § 6972(a)(1)(B). (emphasis added).

CERCLA, in contrast, was enacted in 1980 for the far more limited purpose of remediating inactive hazardous waste sites and to impose liability upon responsible parties for the costs of remediating those sites. See, e.g., Burlington North & Santa Fe Railroad Co. v. United States, 566 U.S. 599, 602 (2009). CERCLA expressly allows a private party to recover cleanup costs

that it has incurred in response to a release or threatened release, *i.e.*, "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing in the environment," 42 U.S.C. § 9601(22), of a hazardous substance from a CERCLA "facility." Facility is defined as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located," 42 U.S.C. § 9601(9)(B). Moreover, a CERCLA plaintiff may only recover those costs from: (1) the current owner or operator of the facility; (2) the owner of operator of the facility at the time the release of hazardous substances occurred; (3) persons who "arranged for **disposal** or treatment" of hazardous substances at the facility, *e.g.*, arrangers; and (4) certain transporters of those hazardous substances. 42 U.S.C. § 9607(a)(1)-(4). (emphasis added).

Particulate Emissions as CERCLA and RCRA "Disposal"

The potential liability for a "disposal" under both CERCLA and RCRA occurs upon "the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters." 42 U.S.C. §6903(3); 42 U.S.C. § 9601(29). The issue of whether this definition encompasses hazardous substances that were first released directly into the air and thereafter deposited in land or water has rarely been addressed by the courts. However, three federal courts that recently examined this issue arrived at different conclusions.

On August 20, 2014, the United States Court of Appeals for the Ninth Circuit held that aerial emissions of diesel particulate matter which eventually settled on the ground and water was not a RCRA "disposal." According to the Court, under the plain language set forth in 42 U.S.C. § 6903(3), the defendants had not disposed of a solid waste "into or on any land or water." Rather, it had emitted its waste into the air, and the waste then traveled onto the land and water. However, in order to impose liability under RCRA, the Court determined that "disposal" only "occurs where the solid waste is **first** placed 'into or on any land or water and is **thereafter** 'emitted into the air.'" Center for Community Action & Environmental Justice v. BNSF Railway Co., 764 F.3d 1019 (9th Cir. 2014) (hereinafter "CCAEJ").

Thereafter, two federal trial courts considered the issue. In Little Hocking Water Ass'n v. E.I. du Pont de Nemours & Co., Case No. 2:09-cv-1081, 2015 U.S. Dist. LEXIS 29200 (S.D. Ohio Mar. 10, 2015), Judge Algenon L. Marbley of the U.S. District Court for the Southern District of Ohio

declined to follow the Ninth Circuit's narrow reading of RCRA's text and legislative history. He ruled that the initial emission of solid perfluorooctanoic acid (also known as PFDA or C8) particles into the air – which eventually contaminated soil and groundwater after settling on the ground – was an actionable RCRA "disposal." Judge Marbley specifically found that RCRA's legislative history and purpose supported a finding that the aerial emission of the C8 particulate matter which fell on the ground and remained there, and which contaminated the groundwater, constituted a disposal of solid waste under RCRA.

This issue was also examined, this time under CERCLA, in Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-LRS, 2014 U.S. Dist. LEXIS 178964 (E.D. Wa. Dec. 30, 2014). In Pakootas, Judge Lonny R. Suko of the U.S. District Court for the Eastern District of Washington held that the aerial emissions of a smelter from a Canadian facility which allegedly caused contamination after settling on the land and water of a contaminated site or facility in Washington could constitute "disposal" giving rise to arranger liability under CERCLA. Of note, Judge Suko did not find that the air emissions from the smelter constituted a CERCLA disposal, because the smelter was not a facility under CERCLA. Rather, the facility from which the disposal occurred was the UCR site in Washington. This unusual fact in this matter may limit the applicability of this decision. Judge Suko explained that "[i]n over 30 years of CERCLA jurisprudence, no court has impliedly or expressly addressed the issue of whether aerial emissions leading to disposal of hazardous substances 'into or on any land or water' are actionable under CERCLA." Thus, under 28 U.S.C. § 1292(b), he certified to the Ninth Circuit the question of whether aerial emissions are actionable under CERCLA if they result in a "disposal" of hazardous substances "into or on any land or water" of a CERCLA "facility." Id. at *13. The Ninth Circuit has agreed to hear this interlocutory appeal.

Although the Ninth Circuit's anticipated ruling in Pakootas is likely to provide at least some level of clarification regarding the scope of CERCLA and RCRA liability associated with air emissions, the issue of CERCLA and RCRA "disposal" liability for particulate emissions appears far from resolved. But the potential ramifications are significant – not only may parties find themselves with liability at CERCLA sites which are located great distances from their plants, but CERCLA cases, which are difficult and complex to begin with, could become much harder to resolve.