

9th Circ. Chromium Ruling May Expand Water System Liability

By **David Fotouhi** (October 14, 2021, 5:34 PM EDT)

A recent opinion from the U.S. Court of Appeals for the Ninth Circuit, broadly interpreting the citizen suit provision in the Resource Conservation and Recovery Act, or RCRA, could expand potential liability for water systems and purveyors, among others, for transporting water that contains molecules of solid waste, even if that water meets applicable regulatory limits.

The RCRA authorizes any person to commence a civil action against any other 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."^[1]

The RCRA defines "solid waste," in turn, as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations."^[2]

The plaintiff in *California River Watch v. City of Vacaville*, decided by the Ninth Circuit on Sept. 29, alleged that Vacaville's water contained hexavalent chromium that had entered the groundwater from a former privately owned wood treatment facility. River Watch alleged that the hexavalent chromium was "discarded material" that had "migrated through groundwater" to the well field from which the city draws its drinking water supply, and subsequently is transported "into the homes of residents through the City's water distribution system."^[3]

Accordingly, River Watch contended on appeal that the city was contributing to the transportation of a solid waste.^[4] A split panel of the Ninth Circuit agreed, and reversed the district court's grant of summary judgment to the city.

Writing for the majority, Judge Patrick Bumatay first held that, if River Watch's expert is credited at trial, then the hexavalent chromium in Vacaville's treated water is a solid waste because it previously had been discarded — "abandoned and cast aside by the [wood treatment] facility's operators."^[5] Then, applying dictionary definitions, Judge Bumatay held that if River Watch's expert is credited at trial, "the City is transporting solid waste through its water-distribution system" because its treated water contains molecules of hexavalent chromium.^[6]



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Critically, Judge Bumatay held that "nothing in RCRA's text suggests that the 'transporter' of the solid waste must also play some role in 'discarding' the waste." [7] And he further rejected the city's argument that the RCRA does not apply to transporting solid waste once that waste has entered the environment, finding no textual basis in the statute to exclude the transportation of environmental media containing a solid waste from potential citizen suit liability. [8]

The majority reached this conclusion notwithstanding that Vacaville's water met federal and California standards for total chromium. [9] Judge Wallace Tashima dissented, and would have held that under existing Ninth Circuit precedent in *Hinds Investments LP v. Angioli*, summary judgment to Vacaville was appropriate, because the city exhibited no "control over the waste disposal process" required for RCRA liability. [10]

Although *Hinds* involved a generator of waste, Judge Tashima read the court's holding in that case to apply to all activities covered by the RCRA's citizen suit provision, reiterating that the *Hinds* court considered and rejected giving "wide breadth" to the statutory term "contribute." [11] The majority's "unduly broad interpretation of the statute" [12] would "produce nonsensical results" and subject "every homeowner, farmer, rancher, municipal water authority, or agricultural irrigation district drawing groundwater or water from a contaminated aquifer" to potential RCRA liability. [13]

And the dissent posited that the majority's holding "creates an arbitrary patchwork of RCRA drinking water regulation, as an overlay to the EPA's Safe Drinking Water regulations," even when sources of contamination are naturally occurring. [14]

In the context of treated water, the court's decision is novel, and it is not clear that its statutory interpretation will be adopted outside of the Ninth Circuit. Furthermore, because the appeal was considered at the summary judgment stage, a fact-finder may ultimately determine that Vacaville is not a past or present transporter of solid waste, or that the city's drinking water does not contain a solid waste.

However, the decision appears likely to cause uncertainty regarding whether the RCRA's citizen suit provision applies to environmental media and useful products such as treated drinking water, which in many instances contain molecules of certain compounds from anthropogenic sources.

As Judge Tashima cautions, the majority's holding may have far-reaching consequences, and provide another statutory tool for citizen groups to challenge water purveyors and agricultural and industrial users who draw, transport and use surface water or groundwater. Many surface water and groundwater sources contain molecules of pollutants, heavy metals, nutrients or other compounds from anthropogenic sources — often at very low levels.

For substances with federal or state drinking water standards — like total chromium — the majority's decision may open the doors to judicial review of whether treated drinking water that meets those levels nonetheless "may present an imminent and substantial endangerment to health or the environment" under the RCRA. In other words, such cases could provide for backdoor judicial review of whether federal or state standards are adequately protective of human health.

What is more, for substances without such standards — for example, metals such as lithium, inorganic compounds such as perchlorate and pesticides such as chlorpyrifos [15] — the majority's opinion may provide a judicial avenue for plaintiffs to challenge a water purveyor or industrial or agricultural user of groundwater or drinking water containing even trace levels of chemicals.

To be sure, defendants in suits brought under this theory are not without responses. First, the RCRA contains a nonduplication provision that provides "[n]othing in this [Act] shall be construed to apply to ... any activity or substance which is subject to the [Clean Water Act or the Safe Drinking Water Act] ... except to the extent that such application ... is not inconsistent with the requirements of such Acts." [16]

However, for contaminants like those listed above, and hexavalent chromium, which currently are considered by the U.S. Environmental Protection Agency as unregulated contaminants under the Safe Drinking Water Act, courts may conclude that a plaintiff proceeding under the RCRA "poses no inconsistency with the SDWA." [17]

Second, a defendant may argue that no imminent or substantial engagement exists — particularly for drinking water that meets federal or state regulatory limits. However, while such an argument is well-suited for trial, it may be more difficult to argue successfully at summary judgment.

Third, a defendant may argue that the chemical or compound present in the water is not a solid waste. For instance, the Ninth Circuit previously held that "PCP-based wood preservative that escapes from treated utility poles through normal wear and tear, while those poles are in use, is not automatically a RCRA 'solid waste'" because the preservative has not been discarded. [18]

Relatedly, a defendant may argue that the source of the compound in the water is not anthropogenic, such that no discard has occurred, similar to Vacaville's argument. Once again, such arguments may be better suited for trial, not summary judgment.

Water systems, water purveyors, agricultural operations, and industrial users that draw, process or distribute water should continue to monitor developments in this area as the case law develops further, and should consider taking initial steps to develop the facts necessary to marshal these and other defenses against potential RCRA citizen suits.

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[1] 42 U.S.C. § 6972(a)(1)(B).

[2] 42 U.S.C. § 6903(27); see also *Conn. Coastal Fisherman's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1315 (2d Cir. 1993) ("[T]he broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment").

[3] *California River Watch v. City of Vacaville*, No. 20-16605, slip op. at 5 (9th Cir. Sept. 29, 2021).

[4] *Id.* at 5-6.

[5] *Id.* at 11.

[6] *Id.* at 12.

[7] Id.

[8] Id at 14.

[9] See U.S. EPA Office of Water, "Chromium in Drinking Water," <https://www.epa.gov/sdwa/chromium-drinking-water> (last accessed Oct. 6, 2021).

[10] California River Watch, No. 20-16605, slip op. at 16 (Tashima, J., dissenting) (quoting Hinds, 654 F.3d at 851).

[11] Id. at 20 (Tashima, J., dissenting) (quoting Hinds, 654 F.3d at 850).

[12] Id. at 23 (Tashima, J., dissenting).

[13] Id. at 22 (Tashima, J., dissenting).

[14] Id. at 24 (Tashima, J., dissenting).

[15] Currently, these compounds are unregulated under the Safe Drinking Water Act, although a small number of states have set drinking water standards for some of them.

[16] 42 U.S.C. § 6905(a); see also *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 507 (4th Cir. 2015) ("The statute simply instructs that RCRA provisions must give way when enforcement would be inconsistent with any of the other delineated acts").

[17] *California River Watch v. City of Vacaville*, No. 2:17-cv-524, 2017 WL 3840265, at *2 (E.D. Cal. Sept. 1, 2017).

[18] *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013); accord *No Spray Coal. Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (aerial spraying of pesticides is not "discard" when carried out "with the design of effecting their intended purpose").