

Defending RCRA Citizen Suits in the U.S.

ACC Legal Quick Hit

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Agenda

- Overview of RCRA's citizen suit provision
- Broad scope of statute = broad range of plaintiffs and claims of "endangerment"
- Recent novel uses of RCRA's citizen suit
 - Air emissions
 - Unregulated "contaminants of emerging concern"
 - Earthquake litigation
 - Climate change
- Key defenses

Overview of RCRA's citizen suit provision

42 U.S.C. § 6972(a)(1)(A)

- “against any person . . . who is alleged **to be in violation** of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to [RCRA]” (emphasis added)

42 U.S.C. § 6972(a)(1)(B)

- “against **any person** . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, 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” (emphasis added)

42 U.S.C. § 6972(a)(2)

- against Administrator for alleged failure to perform non-discretionary act or duty

Overview of RCRA's citizen suit provision

- Relief available under RCRA
 - Injunctive relief
 - No monetary costs (e.g., for past clean-up costs)
 - Civil penalties for regulatory violations
 - Threat of civil penalty awards can provide leverage in settlement negotiations
 - Attorneys' fees and costs
 - Attorney fee/litigation cost awards can help fund parallel discovery and increase defendant's litigation costs

Broad scope of RCRA's “endangerment” provision

- Remedial statute = interpreted liberally by courts
- Does not require showing of immediate or actual harm
 - Requires just that there is potential for near-term harm
- Does not require claim of RCRA regulatory violation(s)

Broad scope of RCRA's "endangerment" provision

- RCRA is not just a tool of environmental/citizen's groups
- Statute's broad scope and fee-shifting provision appeals to a wide range of plaintiffs, including commercial/corporate plaintiffs with substantial resources
- Boundaries of endangerment claims are expanding beyond traditional claims of contamination due to improper waste disposal

Recent novel uses of RCRA's citizen suit

- Expanding definition of “solid waste” to include air emissions
 - *Little Hocking Water Ass'n, Inc. v. E.I. du Pont Nemours and Co.*, 91 F.Supp.3d 940 (S.D. Ohio 2015)
 - Suit by water provider alleging air emissions of perfluorooctanoic acid (PFOA or C8) had contaminated well-field and caused an endangerment under RCRA
 - On summary judgment, Court rejected DuPont's argument that air emissions were uncontained gases and did not constitute “disposal” of “solid wastes”
 - Court found when particulate emissions ultimately fell and settled on land and water, those particulates were disposed of solid waste giving rise to claim under RCRA

Recent novel uses of RCRA's citizen suit

- Expanding endangerment claims to “contaminants of emerging concern”
 - *Tennessee Riverkeeper Inc. v. 3M Company et al.*, No. 5:16-CV-01029 (N.D. Ala. filed June 23, 2016)
 - Alleges PFOA and perfluorooctane sulfonate (PFOS) disposed of by 3M have contaminated Tennessee River Wheeler Reservoir and caused an endangerment to health and the environment
 - PFOA/PFOS are not currently regulated by EPA; EPA issued non-regulatory non-enforceable PFOA/PFOS health advisories in May 2016
 - Suit poses difficult issues for defendants (and courts) regarding applicable standard to establish harm

Recent novel uses of RCRA's citizen suit

- Expanding claims endangerment under RCRA to “triggered” earthquakes
 - *Sierra Club v. Chesapeake Operating LLC, et al.*, No. CIV-16-134-F (W.D. Okla. filed Feb. 16, 2016)
 - Alleging disposal of produced water from oil and gas extraction causes earthquakes that endanger State of Oklahoma
 - Suit differs from traditional RCRA claims of endangerment due to contamination, and alleges endangerment unrelated to any contamination

Creative Uses of RCRA Imminent and Substantial Endangerment Citizen Suits

- Expanding scope of harm under RCRA's endangerment provision to include climate change
 - *Conservation Law Foundation v. ExxonMobil Corp., et al.*, No. 1:16-cv-11950-MLW (D. Mass. filed Sept. 29, 2016)
 - Alleging imminent and substantial endangerment under RCRA due to alleged climate change risks
 - Novel theory that alleged “failure to adapt” to climate change risks gives rise to endangerment and right of injunctive relief under RCRA

Key Defenses

- Notice deficiencies
- Diligent prosecution
- Abstention and primary jurisdiction doctrines
- Standing
- Zone of interests

Questions?

Thank you!



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