Ninth Circuit Reverses Itself – New Opinion Removes Potential for RCRA "Transporter" Liability for Water Providers

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On July 1, 2022, the United States Court of Appeals for the Ninth Circuit took the unusual step of reversing its previous decision in *California River Watch v. City of Vacaville*, No. 20-16605, 2022 WL 2381056 (9th Cir. July 1, 2022). The superseding opinion held that the City of Vacaville (City) did not qualify as a transporter of solid waste, thereby reversing the Ninth Circuit's prior opinion in *California River Watch v. City of Vacaville*, 14 F.4th 1076 (9th Cir. 2021).

The plaintiff, California River Watch (River Watch), alleged that City qualified as a transporter of solid waste, subjecting it to liability under the Resource Conservation and Recovery Act (RCRA). According to River Watch, the waste at issue – hexavalent chromium, a carcinogen that is harmful to humans – had been introduced into the environment by a wood treatment facility. River Watch's claim was that since City transported the discarded hexavalent chromium through its water distribution system and into City residents' homes, City qualified as a transporter of solid waste under RCRA.

The Ninth Circuit held, both in its original and new opinion, that California River Watch had created a triable issue of fact as to whether the hexavalent chromium qualified as "discarded material" (and therefore solid waste) under RCRA since it had been discarded by the companies that used it, which had allowed the chemical to drip off of treated wood into the environment.

In the original opinion, the Ninth Circuit focused on the dictionary definition of "transportation," holding that City did qualify as having transported the waste. But based upon additional briefing by the parties on a petition for rehearing *en banc*, the Ninth Circuit decided to revisit this holding.

In the superseding opinion, the court reversed its original decision, instead holding that City did *not* qualify as having transported the waste. The court discussed the importance of analyzing statutory context to avoid being misled by dictionary definitions alone. Hence, it analyzed how "transportation" was used in a variety of provisions in the statute.

- The court noted that when "transportation" was used in RCRA, it referred to "to the specific task of moving waste in connection with the waste disposal process."
- It also held that other sections, including RCRA's criminal provisions, reinforced this narrower reading of "transportation," as the statute takes a more nuanced view of "transportation" than the dictionary definition alone. Thus, mere conveyance outside of the waste disposal process could not qualify as "transportation."
- Last, the court turned to a variety of other factors, including RCRA's structure and applicable regulations and RCRA's endangerment provision, which the court had already narrowly construed in a previous case relating to disposal, *Hinds Invs., L.P. v. Angioli,* 654 F.3d 846, 851 (9th Cir. 2011).

The court found that all of the factors it analyzed apart from the dictionary definition supported finding that City was not liable as a transporter, because RCRA liability requires that "the 'transportation' at issue must also be directly connected to the waste disposal process—such as shipping waste to hazardous waste treatment, storage, or disposal facilities." (Superseding Opinion at 17-18.) The panel therefore affirmed the district court's grant of summary judgment to the City; the accompanying order dismissed the petition for rehearing *en banc* as moot, but noted that further petitions for rehearing could be filed in accordance with the court rules.

Judge Tashima issued an opinion concurring with the superseding opinion, which echoed his dissent from the original decision. The concurrence focuses on *Hinds* as controlling precedent. *Hinds* required a measure of control over the waste or active involvement to qualify as contributing to handling/storage/treatment/transportation/disposal. Since City did not have a measure of control over the waste and was not actively involved in transporting it, under *Hinds*, City was *not* liable. In responding to this reasoning, the majority characterizes *Hinds* as focusing only on contributions to "disposal," whereas the concurrence characterizes *Hinds* as focusing on contributions to any of the potential alternatives for liability under RCRA.

Several organizations had submitted amicus briefs for and against the City of Vacaville's petition for rehearing *en banc*, including the Natural Resources Defense Council, the National League of Cities, the League of California Cities, and several groups representing water supply agencies. Both the interest of outside groups and the fact that the Ninth Circuit reversed its previously published decision shows the importance of this case. Although the original opinion was limited in that it only held that River Watch had created a triable issue of fact with regard to the interpretation of "transportation" under RCRA and sent the case back to the district court for trial, the Ninth Circuit's (now reversed) initial decision likely would have had significant repercussions for water providers in California (and other Ninth Circuit states) if it had not been reversed.

That ruling opened up water providers to a number of lawsuits under RCRA for transporting waste based solely on operating the infrastructure they use to provide water to their customers, even if the concentrations of the chemicals at issue were below the Maximum Contaminant Level (MCL) established for those chemicals. (Vacaville had argued both in the district court and on appeal that RCRA's anti-duplication provision barred California River Watch's suit, because the trace levels of hexavalent chromium in its water did not exceed the MCL for total chromium. However, neither the district court nor the Ninth Circuit reached that issue.) The superseding opinion removes the potential liability for the providers under the prior opinion,

giving water providers the opportunity to breathe a little easier.

It is likely that California River Watch will again appeal the dismissal of its claims, either by filing its own petition for rehearing *en banc* or seeking review in the United States Supreme Court. Nossaman will continue to monitor developments in this case.