

RCRA/Fireworks Explosion: Federal District Court Addresses Challenge to Criminal Charges

Arkansas Environmental, Energy, and Water Law Blog



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A United States District Court in Hawaii addressed a challenge to Resource Conservation and Recovery Act ("RCRA") criminal charges. See *United States v. Donaldson Enterprises, Inc.*, 2016 WL 4445233 (D. Haw. Aug. 22, 2016).

The RCRA criminal enforcement action arose out of an explosion of confiscated fireworks that killed five workers in Hawaii.

Defendants, which included Donaldson Enterprises, Inc. ("DEI") and two of its executives, were charged with treating, storing, and disposing of hazardous waste without a permit in violation of RCRA. They moved to dismiss the criminal charges arguing that:

1. their due process rights had been violated;
2. the rule of lenity should be applied; and
3. the statutory definition of "reactivity" was unconstitutionally vague.

DEI was hired as a government subcontractor to transport, store, and dispose of illegal fireworks that had been seized by the government. The fireworks were known as (1) the "Lindsey Fireworks," seized in 2007 and (2) the "Chang Fireworks," seized in 2010.

A 90-day Temporary Emergency Permit had been issued in 2010 to treat, transport, and dispose of the Lindsey Fireworks. DEI, is stated to have continued to treat, store, and dispose of fireworks after the expiration of the temporary permit. The opinion further notes:

On April 8, 2011, DEI was allegedly storing black powder and flash powder resulting from the treatment of fireworks at the Waikele bunker. Something caused the powder to ignite. There was an explosion that killed five people.

The elements of a RCRA charge (i.e., unpermitted treatment/storage) in this context requires that:

1. a defendant knowingly treated, stored, or disposed of hazardous waste;
2. the defendant knew the material had the potential to be harmful to others or to the environment;
3. the material was identified or listed by the EPA as hazardous waste pursuant to RCRA; and

4. the defendant acted without a permit.

Charles Donaldson, Carlton Finley and DEI (collectively “Defendants”) were charged with:

1. conspiracy to treat and store hazardous waste without a RCRA permit
2. treatment of hazardous waste without a permit
3. storing hazardous waste without a permit

A material is a RCRA hazardous waste when it is (1) not excluded by any regulation; and (2) exhibits one at least one of four characteristics: ignitability, corrosivity, reactivity, or toxicity. The relevant characteristic for fireworks, reactivity, occurs when a solid waste is capable of detonation, explosive reaction, or decomposition when (1) subjected to a strong initiating source; (2) heated under confinement; or (3) subjected to standard temperature and pressure.

The treatment, storage, or disposal of hazardous waste may generally not occur in the absence of a RCRA permit. A limited exclusion may apply if:

1. there is an “immediate threat” to human health, public safety, property, or the environment as determined by an explosives or munitions emergency response specialist; or
2. no specialist has made any determination, but there nevertheless appears to be an “imminent and substantial endangerment,” in which case a 90-day Temporary Emergency Permit may be issued.

An official at Hawaii’s Dep’t of Health is stated to have initially planned to allow DEI to burn the Chang Fireworks without a permit. Such action is allowed when a specialist determines that the waste is an “immediate threat.” The official had interpreted a memo, sent by a customs agent, instructing that four boxes of the Chang Fireworks were to be retained for a criminal case, as giving permission to treat, store, and dispose of the Chang Fireworks without a permit. Attached to the memo was a note, written by an Assistant U.S. Attorney (“AUSA”), asking DEI to “[e]nsure that destruction of fireworks evidence Not retained” was witnessed.

Although DEI also interpreted the memo and the AUSA’s note as permission to proceed without a permit, other parties disagreed. Gracelda Simmons, a supervisor in Hazardous Waste Section of the Dep’t of Health, for example, instead determined a Temporary Emergency Permit was needed because neither the customs agent nor the AUSA was qualified as a specialist. Neither was therefore legally authorized to declare an “immediate threat” or grant the destruction of the Chang Fireworks without a permit; and the very existence of DEI’s contract to dispose of the fireworks was deemed to be evidence of the lack of an immediate threat.

Hawaii’s Dep’t of Health was stated to routinely issue Temporary Emergency Permits for storage and disposal of seized fireworks on the basis that (1) such fireworks posed an “imminent and substantial endangerment”; and (2) a regular Hazardous Waste Permit would take three to five years to obtain.

Defendants’ argued in their motion to dismiss that Simmons (the hazardous waste supervisor at Hawaii’s Dep’t of Health) violated their due process rights because she had acted in a manner that was “arbitrary, capricious, or characterized by an abuse of discretion” by denying DEI the opportunity to destroy fireworks without a permit.

The court rejected this argument. It held that Defendants failed to show:

1. that the fireworks fell within the “immediate threat” exception to the permit requirement;
2. that either the customs agent or the AUSA qualified as a specialist to determine that the fireworks could be disposed of without a permit; or

3. that Simmons acted arbitrarily or capriciously in requiring a permit.

Because Defendants cited no law or evidence indicating the presence of an immediate threat or that the presence of such a threat could be determined by someone other than a specialist, the court held that it was not arbitrary or capricious to require a permit.

Defendants also cited the Rule of Lenity in support of its Motion to Dismiss. This rule provides that a court should resolve statutory ambiguity in favor of a defendant.

The court rejected Defendants' argument that the statutory terms "imminent endangerment" and "immediate threat" were indistinguishable and ambiguous. The relevant statutes required Defendants to either:

1. obtain a regular permit;
2. obtain a temporary permit in the case of an "imminent and substantial endangerment"; or
3. satisfy the requirements for an "immediate threat" as determined by a specialist and proceed without a permit.

Whether an item poses an "immediate threat" was deemed a matter that only a specialist is authorized to determine. No one authorized to declare the fireworks an "immediate threat" had made such a declaration. The second option required a permit. The third one did not. The court held that the applicable laws were distinguishable, clear, and could not be ignored on the basis of alleged ambiguity.

Finally, the court rejected Defendants' argument that the statutory definition of "reactivity" was unconstitutionally vague.

Defendants argued that, because it was unclear what was meant by "readily capable" of detonation, explosive decomposition, or reaction "at standard temperature and pressure," hazardous waste could mean anything from soft drinks to cottage cheese, both of which may explode when heated under confinement. Therefore, Defendants argued, the statutory definition of reactivity was too vague to give defendants sufficient notice that their conduct was illegal.

The court agreed that a criminal statute is void for vagueness if it fails to provide a defendant adequate notice that his conduct is prohibited. However, the court emphasized that if a statutory provision involves the conduct of a select group of persons with specialized knowledge the standard is lower.

Because Defendants' business involved the storage and disposal of hazardous waste the court believed they should have understood that the fireworks were reactive and hazardous. Therefore, despite the fact that innocuous substances such as cottage cheese and soft drinks are also reactive, the court held that no unconstitutional vagueness existed. Further, household wastes such as cottage cheese, soft drinks, hair spray, etc. were held not relevant to the discussion because:

1. household wastes are specifically excluded from RCRA's definition of "hazardous waste"; and
2. such wastes, even if in the possession of a commercial entity rather than a household, must still exceed a designated volume to be considered hazardous.

The court also rejected Defendants' argument that, because the rules are so broad that they can be read to cover innocuous substances like canned soda or beer, the rules allow for arbitrary enforcement. Instead, it held that the case did not involve any law permitting a "standardless sweep" or allowing officials to "pursue their own predilections," because there are definitive guidelines for determining whether hazardous waste is reactive under RCRA.

The court therefore rejected Defendants' motion to dismiss the indictment, holding that:

1. Defendants' due process rights had not been violated;

2. the Rule of Lenity did not apply; and
3. the statutory definition of reactivity was not unconstitutionally vague.

[A copy of the decision can be downloaded here.](#)