

Hexavalent Chromium/RCRA: Federal Appellate Court Addresses Potential Liability of Public Water System



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) addressed in a September 29th Opinion the potential liability of a public water system pursuant to the imminent and substantial endangerment provisions of the Resource Conservation and Recovery Act (“RCRA”). See *California River Watch v. City of Vacaville*, No. 20-16605.

A citizen suit action was filed by an environmental organization alleging the public water system was potentially subject to those RCRA provisions because the groundwater it utilized contained hexavalent chromium.

The hexavalent chromium originated from a wood treating facility release impacting the utility’s well field.

Various companies are stated to have operated wood treatment facilities in Elmira, California, from 1972 to 1982. Certain waste products from the operation of these facilities were known to contain hexavalent chromium. Cited in the Opinion is Wickes Forest Industries, Inc., which is stated to have:

. . . dumped a massive amount of hexavalent chromium in the ground near Elmira, California (“the Wickes site”).

The environmental organization California River Watch (“CRW”) concluded that hexavalent chromium from the Wickes site migrated through groundwater to the Elmira Well Field (“Well Field”). The City of Vacaville (“City”) was stated to draw a significant amount of its water from the Well Field.

CRW’s expert conducted testing of potable water from the City’s well-heads and resident taps. Such testing was alleged to have indicated elevated concentrations of hexavalent chromium.

The CRW expert also opined that the hexavalent chromium moves from the Wickes site to the Well Field. From the Well Field the hexavalent chromium was stated to enter the homes of residents. This entry is alleged to have been possible because of its movement through the City’s water-distribution system.

CRW filed a RCRA citizen suit against the City. The lawsuit alleged that the City is:

. . . “contributing to” the “transportation” of hexavalent chromium a “solid . . . waste which may present an imminent and substantial endangerment to health or the environment.”

The Ninth Circuit notes that the RCRA definition of solid waste includes the phrase “discarded material.” One of the two key issues was characterized as determining whether the hexavalent chromium was “discarded.”

The United States District Court granted a Motion for Summary Judgment filed by the City on the basis that its water-processing activities were not adequately demonstrated to constitute discarding of solid waste under RCRA.

CRW appealed.

CRW argued on appeal that:

. . . because the hexavalent chromium originates from the Wickes site, it is “discarded material” under RCRA, and thus the City is liable for its transportation through its water-distribution system.

The Ninth Circuit notes that RCRA defines solid waste 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.

In discussing the meaning of discarded material, the Ninth Circuit states that it has characterized this definition as including “case aside; reject; abandon; give up.” A key consideration cited by the Ninth Circuit is whether a product has served its intended purpose and is no longer wanted by the consumer.

The hexavalent chromium is described by the Ninth Circuit as left over waste. As a result it determined CRW created a triable issue on whether the hexavalent chromium was a discarded material.

The Ninth Circuit then addressed whether the City was contributing to the past or present handling, treatment, transportation, or disposal of the hexavalent chromium. It concludes that there is also a triable issue as to whether the City is a “past or present transporter” of solid waste. To reach this conclusion it holds that RCRA does not require that the “transporter” of the solid waste play some role in “discarding” the hazardous waste.

The United States District Court’s granting of summary judgment to the City is reversed.

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