

Hexavalent Chromium/RCRA: Federal Appellate Court Reconsiders Public Water System Liability



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

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Co-Author: Bryce Jefferson

The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) in a July 1st Opinion addressed a prior September 29th decision discussing 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.

The Ninth Circuit withdrew the September 29th Opinion and reversed its prior finding.

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

The hexavalent chromium in the groundwater likely originated from a release at a wood treating facility known as the Wickes site.

The environmental organization California River Watch (“CRW”) concluded that the hexavalent chromium from the Wickes site migrated through groundwater to the Elmira Well Field (“Well Field”). The City of Vacaville (“City”) allegedly drew 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 allegedly 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 allegedly entered the homes of residents 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 United States District Court granted the City’s Motion for Summary Judgment on the basis that its water-processing activities were not adequately demonstrated to constitute discarding of solid waste under RCRA.

CRW appealed, arguing 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 first considered whether the hexavalent chromium was “discarded.” The RCRA definition of solid waste was noted to include the phrase “discarded material.”

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.”

The Ninth Circuit concluded that “discard” means to “cast aside; reject; abandon; give up.” A key consideration was deemed to be whether the product had served its intended purpose and was no longer wanted by the consumer.

The Ninth Circuit described hexavalent chromium as leftover waste. As a result, a triable issue was held to exist on whether the hexavalent chromium was discarded material.

The Ninth Circuit also addressed whether the City was contributing to the past or present handling, treatment, transportation, or disposal of the hexavalent chromium. It concluded that there was a triable issue as to whether the City was a “past or present transporter” of solid waste. RCRA was interpreted as requiring that the “transporter” of the solid waste play some role in “discarding” the hazardous waste.

Therefore, the Ninth Circuit in the September 29th Opinion reversed the summary judgment granted to the City.

The City argued in support of reconsideration that for a transporter of waste to be liable under RCRA there must be a direct connection to the waste disposal process.

The Ninth Circuit agreed. It found that RCRA does not apply to transporters “who happen to move hazardous waste under any circumstance, but only to those ‘shipper[s]’ of the waste to ‘hazardous waste treatment, storage, or disposal facilities.’”

For a transporter to be liable under RCRA, it must have been actively involved in disposing the solid waste. Because the City was not connected to the disposal of the hexavalent chromium, there was not a triable issue on whether it was a transporter of solid waste under RCRA.

The Ninth Circuit’s September 29, 2021, opinion was withdrawn. The United States District Court’s granting of summary judgment to the City is reinstated.

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