



OHIO COURT EMBRACES USE OF FEDERAL SOLID WASTE DISPOSAL LAW TO REGULATE AIR EMISSIONS

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On March 10, 2015, a federal district court in Ohio held in a novel ruling that the emission of air pollutants which later fell onto the ground was “disposal” of a “solid waste” under the Resource Conservation and Recovery Act (RCRA). *Little Hocking Water Assoc., Inc. v. DuPont de Nemours and Co.*¹ As a result, a citizen-plaintiff was allowed to bring an “imminent and substantial endangerment” claim under RCRA § 7002. *Little Hocking* conflicts with a decision last year by the U.S. Court of Appeals for the Ninth Circuit in *Center for Community Action and Environmental Justice v. BNSF Railway Company*² (CCA EJ), which rejected a RCRA § 7002 claim based on air emissions, ruling instead that such claims required direct disposal onto land. *Little Hocking’s* expansive interpretation of “disposal of a solid waste” threatens increased RCRA litigation and greater uncertainty of the scope and reach of the law’s regulatory requirements.

In *Little Hocking*, the plaintiff is a non-profit public water provider who sold potable water to approximately 12,000 residents of Southern Ohio. The water association obtains drinking water from the groundwater beneath its 45-acre wellfield. The defendant owns and operates the Washington Works Facility, approximately 1,300 feet downriver from the wellfield in West Virginia. It used PFOA (perfluorooctanoic acid, known as “C8”) to manufacture Teflon-related products at its Washington Works from 1951 to June 2013. The plaintiff claimed DuPont’s releases of C8 via air and water emissions impaired its ability to expand its water service projects, which in turn decreased revenue, interfered with its business operations, and harmed the environment.³

Unable to resolve the dispute out of court, the water association brought a variety of claims, including the RCRA imminent and substantial endangerment claim. RCRA § 7002 provides:

any person may commence a civil action on his own behalf . . . 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 . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.⁴

¹ 2015 WL 1038082 (S.D. Ohio Mar. 10, 2015).

² 764 F.3d 1019 (9th Cir. 2014). For an analysis of a United States District Court for the Eastern District of Washington decision at odds with CCA EJ, see Kevin T. Haroff and Zachary A. Kearns, *CERCLA Liability for Air Emissions?: Federal Court Ruling Could Supersize Superfund Law*, LEGAL OPINION LTR. (Wash. Lgl. Found.), Apr. 10, 2015, available at http://www.wlf.org/upload/legalstudies/legalopinionletter/HaroffKearnsLOL_041015.pdf.

³ *Little Hocking Water Assoc., Inc.*, 2015 WL 1038082, *1, *3-4.

⁴ 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

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Hence, the court needed to decide whether there had been “disposal” of a “solid waste” under RCRA. “Disposal” is defined as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”⁵ “Solid waste” is defined in relevant part as a “discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial . . . operations.”⁶

Southern District of Ohio Judge Algenon L. Marbley held that the “aerial emissions of C8” constituted “solid waste.”⁷ The court based its rationale on an earlier Southern District of Ohio decision, *Citizens Against Pollution v. Ohio Power Co.*,⁸ which had held that flue gas emissions from a power plant were “discarded material.”⁹ The *Little Hocking* court then determined that the deposition of C8 particles from the defendant’s smokestacks onto the plaintiff’s wellfield was “disposal” of a solid waste, despite the fact that these emissions were not directly made “into or on any land or water” per the definition of “disposal.”¹⁰

Drawing upon *Ohio Power*, the court determined that “RCRA’s definition of ‘disposal’ required only some evidence that the discharge touches down onto land, which the flue gas had, and did not necessarily require the discharge to enter the environment, air or waters.”¹¹ Indeed, the court found the situation in which solid particles “are emitted into the air, fall onto the ground, remain there, and then contaminate the soil and groundwater . . . is precisely the type of harm RCRA aims to remediate in its definition of ‘disposal.’”¹² The court then determined that the defendant’s actions could cause a risk to the environment, which constituted a “substantial and imminent risk of harm” sufficient for the court to deny DuPont’s motion for summary judgment.¹³

In *CCA EJ*, the Ninth Circuit reached the opposite result. There, an environmental NGO brought a RCRA citizen suit for “imminent and substantial endangerment” allegedly caused by the emission of diesel particulate matter emitted by trains and other heavy-duty vehicles at defendant BNSF’s railyards.¹⁴ These particles allegedly fell onto the ground and into the water, from which some of them were allegedly stirred back up into the air by wind, at which point they caused respiratory problems and increased risk of cancer.¹⁵ The court of appeals concluded that the definition of “disposal” “includes only conduct that results in the placement of solid waste ‘into or on any land or water.’”¹⁶ Given that the particulates here were “first emitted into the air,” they did not meet the definition of disposal.¹⁷

How this issue plays out in the courts—and whether the U.S. Environmental Protection Agency (EPA) follows the direction of *Little Hocking*—bears watching. If other courts do embrace the Southern District of Ohio’s novel reasoning, RCRA could rapidly become environmentalists’ favorite new emissions control litigation tool against a wide range of businesses. Furthermore, if courts determine that a “disposal of a solid waste” occurs when air emissions land on the ground, a whole other set of regulatory requirements could be triggered. Waste generators, which already face a dizzying array of existing state and federal disposal regulations, would have to evaluate additional unexpected and unpredictable compliance and litigation risks.

⁵ 42 U.S.C. § 6903(3).

⁶ 42 U.S.C. § 6903(27).

⁷ *Little Hocking* at *19.

⁸ Case No. C2-04-CV-371, 2006 WL 6870564 (S.D. Ohio July 13, 2006).

⁹ *Id.* at *5; *Little Hocking* at *17, *18.

¹⁰ *Little Hocking* at *19.

¹¹ *Id.* at *17.

¹² *Id.* at *19.

¹³ *Id.* at *24.

¹⁴ 764 F.3d at 1021.

¹⁵ *Id.*

¹⁶ *Id.* at 1024.

¹⁷ *Id.*