California River Watch v. City of Vacaville—Triable issue exists over RCRA liability where city distributes water to residents from wells contaminated through groundwater migration with hexavalent chromium

The City of Vacaville distributes water from a well field to its residents. The water contains a human carcinogen, hexavalent chromium, that migrated to the field from a now-closed wood treatment operation (the Wickes facility) whose wood products likely contained that chemical. Plaintiff California River Watch sued the City in 2017, claiming that hexavalent chromium is "solid waste" under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 to 6992k, and that the City is contributing to its transportation via distribution to water users. On cross-motions for summary judgment, the district court ruled in the City's favor because "River Watch does not present sufficient argument or evidence to demonstrate how Vacaville's water processing activities can qualify as 'discarding' 'solid waste' under the statute." *Cal. River Watch v. City of Vacaville*, 473 F. Supp. 3d 1081, 1092 (E.D. Cal. 2020). Instead, "the water itself is ... being delivered to the intended customers in the product's intended state for use as drinking water." *Id.* at 1093.

A divided Ninth Circuit panel reversed the judgment and remanded for further proceedings. *Cal. River Watch v. City of Vacaville*, No. 20-16605, 2021 WL 4449231 (9th Cir. Sept. 29, 2021). The majority first rejected the City's argument that River Water had forfeited its argument that hexavalent chromium is a "discarded material" under RCRA. On the merits, it identified the three elements necessary for establishing RCRA liability: "(1) that the defendant 'ha[s] contributed to the past or [is] contributing to the present handling, treatment, transportation, or disposal' of certain material; (2) that this material constitutes 'solid waste' under RCRA; and (3) that the solid waste 'may present an imminent and substantial endangerment to health or the environment.'"

The majority held that the second element—that hexavalent chromium is "solid waste"—presented a triable issue, given the River Watch expert's opinion that "[w]hen the hexavalent chromium was discharged into the environment after the wood treatment process, it was not serving its intended use as a preservative, and it was not the result of natural wear and tear. Instead, the hexavalent chromium was leftover waste, abandoned and cast aside by the facilities' operators."

Returning to the first element, the majority again found a triable fact issue, citing the expert's opinion that the City's water pumped from the well field contained hexavalent chromium and likely derived from the Wickes facility. The key question, however, was whether the City would be a RCRA-liable "transporter" of the waste material under these circumstances. The majority interpreted the statute as "ma[king] 'transporter[s]' independently liable even if not otherwise responsible for discarding or creating the waste in the first place. This conclusion is buttressed by the fact that the endangerment provision includes no mens rea requirement." The majority also found unpersuasive the City's "distinguish[ing] between the transportation of solid waste and the transportation of groundwater contaminated by solid waste" because "nothing in the text of the statute creates a 'groundwater' exception to RCRA. The endangerment provision applies to 'transportation' of 'any solid [waste].'"

The majority concluded by rejecting the City's invocation of the "absurdity doctrine." It reasoned that "we cannot say that interpreting RCRA based on its plain meaning would lead to absurd

results" and that "[e]ven if narrowing RCRA liability as envisioned by the City and dissent 'makes eminent sense,'... that is a determination for Congress, not the courts."

The dissent principally discussed, and disagreed with, the majority's resolution of the first element of a viable RCRA claim. It relied upon *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846 (9th Cir. 2011), where the court "held that [42 U.S.C.] § 6972(a)(1)(B) 'requires that a defendant be actively involved in or have some degree of control over the waste disposal process to be liable under RCRA.'" But here,

> the City had nothing to do with the waste disposal process at issue. ... That process involved a single step: the operators of the Wickes facility discarded hexavalent chromium on site. Subsequent events—the alleged migration of the contaminant to the Elmira Well Field, the contamination of the City's wells, and the City's drawing of groundwater from its wells—were not, under any conceivable theory, part of that process.

Thus, "[t]his should be a simple case" controlled by *Hinds*. The dissent also would have found waiver because, in its view, River Watch "abandoned ... flawed theories [offered before the district court as to why hexavalent chromium was discarded "solid waste"] and offered an entirely new one—the theory that the hexavalent chromium in the City's water is 'solid waste' within the meaning of RCRA because it was discarded by the operators of the Wickes facility."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/29/20-16605.pdf