Revisiting *RCRA Endangerment Claims: A New Way to Regulate Point Source Discharges*

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In the May 2017 issue of *Environmental Law in New York*, we reported how plaintiffs were trying to use endangerment claims under 42 U.S.C. § 6972(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA) to regulate permitted point source discharges. Our article was triggered by the recent case *Tennessee Riverkeeper, Inc. v. 3M Co.*,[1] in which the plaintiffs were using RCRA endangerment claims in an effort to regulate discharges of perfluorinated chemicals. The federal district court in Alabama had refused to dismiss the case because, in its view, the defendants had failed to provide "any authority stating that a citizen cannot bring an RCRA claim to try to impose stricter limits on the disposal of hazardous waste than those imposed by an EPA-approved State permit or to supplement the terms of such a permit."[2]

As we discussed in our article, the *Tennessee Riverkeeper* decision is inconsistent with a broad reading of RCRA's non-duplication provisions, because it allows exactly the sort of dual regulation that the non-duplication provisions were intended to prevent. The decision also appears to allow a judge to set his or her own discharge limits, displacing the limits (or the lack thereof) established by agency scientists after notice and comment from the regulated community and public.

On November 2, the Ninth Circuit visited this same issue in *Ecological Rights Foundation v. Pacific Gas & Electric Co.* (*ERF*).[3] In *ERF*, the Ninth Circuit undertook an extensive (and largely unnecessary) analysis of RCRA's non-duplication provisions and arrived at the same place as the *Tennessee Riverkeeper* court—"RCRA's anti-duplication provision does not bar RCRA's application unless the specific application would conflict with identifiable legal requirements promulgated under the [Clean Water Act] or another listed statute."[4] In other words, plaintiffs are free to use RCRA to impose discharge limits on any substance not specifically named in a Clean Water Act permit, and perhaps to lower the discharge limits of substances that are.

ERF involved a citizen suit by the Ecological Rights Foundation against Pacific Gas & Electric Co. (PG&E) under both the Clean Water Act and, as relevant here, RCRA. The Ecological Rights Foundation alleged that PG&E had spread oil and wood chips with various wood treatment chemicals around the grounds at 31 of its northern California facilities. Stormwater and truck tires then dispersed these chemicals, eventually into the San Francisco and Humboldt Bays. The parties moved for summary judgment and the district court decided in favor of PG&E finding, among other things, that RCRA's anti-duplication provision was not "an additional avenue to impose a different regulatory requirement" from those imposed under the Clean Water Act.[5]

The Ninth Circuit reversed. Its analysis began with a discussion that might reasonably have concluded it: as the court found, PG&E's stormwater discharges were exempt from regulation under the Clean Water Act. Since the anti-duplication provision only applies to "any activity or substance which is subject to" the Clean Water Act (among other statutes), the court could have found that the anti-duplication provision did not apply to exempt discharges, reversed the decision below, and been done with the issue.[6]

The Ninth Circuit did not do so, however. After considerable analysis, it held that plaintiffs can use RCRA to regulate point source discharges unless there is a "conflict with identifiable legal requirements." The court's handling of a second anti-duplication issue, that of permitted indirect discharges, left no doubt that it meant what it said.

In addition to their overland discharges, the PG&E facilities had indirect discharges through municipal treatment facilities. These discharges were subject to *two* permits—the PG&E permit and the municipal treatment facility Clean Water Act permit—so they clearly were within the scope of a broad reading of the anti-duplication provision. Nonetheless, the Ninth Circuit reversed on this issue as well, finding that PG&E had not identified any legal requirements in the permits that might be "inconsistent" with requirements under RCRA.[7]

This is problematic for a number of reasons. A permitted discharge may contain tens or hundreds of hazardous substances, but the permit typically regulates only those of most concern. According to the Ninth Circuit, however, the rest can now be regulated by RCRA. RCRA may even apply to those already regulated under the permit, as long as RCRA imposes "stricter limits" (in the words of the *Tennessee Riverkeeper* court) than the Clean Water Act.

If the only criterion is that RCRA endangerment claims must impose "stricter limits" than existing permits, plaintiffs may be able to use endangerment claims to seek new pollution control technology, reporting requirements, and other terms in addition to new or stricter discharge standards. Armed with *Ecological Rights Foundation* and cases of similar effect, plaintiffs may now have a legal basis for trying to use RCRA to rewrite any and all terms of Clean Water Act permits.

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[3] 2017 U.S. App. LEXIS 21957 (9th Cir. Nov. 2, 2017).
[4] *Ecological Rights Found.*, 2017 U.S. App. LEXIS 21957, at *27.
[5] *See Ecological Rights Found.*, 2017 U.S. App. LEXIS 21957, at *14.
[6] *See* 42 U.S.C. § 6905(a).
[7] *Ecological Rights Found.*, 2017 U.S. App. LEXIS 21957, at *33.