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

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In 1972, Congress enacted the Clean Water Act (CWA), which created, among other things, the National Pollutant Discharge Elimination System (NPDES) of permits that allowed entities to lawfully discharge their wastewater into the nation’s surface waters.¹ NPDES permits were both a barrier to unlawful discharges and a shield for lawful ones: dischargers without a permit were subject to enforcement, whereas dischargers with a

permit (and in compliance with it) were protected from enforcement and other collateral attack.

This year, in *Tennessee Riverkeeper, Inc. v. 3M Co.*,² the federal district court for the Northern District of Alabama held that there may be, in effect, a new sheriff in town governing industrial discharges: the Resource Conservation and Recovery Act (RCRA). No matter that a discharge is in compliance with its NPDES permits; the discharge might also have to comply with RCRA’s imminent and substantial endangerment “standard” as well.³ In the words of the court, it would not dismiss the case because 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.”⁴

Congress foresaw and tried to foreclose exactly this kind of duplicative regulation when it adopted RCRA in 1976. Congress inserted in RCRA two separate provisions intended to wall off RCRA from CWA-regulated discharges. First, Congress excluded from the definition of “solid waste”—and thereby from regulation under RCRA—“industrial discharges which are point sources subject to permits under” CWA Section 402 (*i.e.*, NPDES permits).⁵ Second, Congress barred RCRA from applying to “any activity or substance which is subject to” a host of environmental statutes including the CWA, “except to the extent that such application (or regulation) is not inconsistent with the requirements of such” other environmental statutes.⁶

¹ 33 U.S.C. § 1251(a).

² 2017 U.S. Dist. LEXIS 27435 (N.D. Ala. Feb. 10, 2017).

³ 42 U.S.C. § 6972(a)(1)(B).

⁴ 2017 U.S. Dist. LEXIS 27435, at *22–23 (N.D. Ala. Feb. 10, 2017).

⁵ 42 U.S.C. § 6903(27).

⁶ 42 U.S.C. § 6905(a).

At the time, these two exclusions appeared to be an effective wall against duplicative regulation.

In the last several years, however, plaintiffs have begun to dismantle this wall using RCRA citizen suits alleging imminent and substantial endangerment (endangerment claims) under RCRA Section 7002(a)(1)(B).⁷ The plaintiffs' strategy has been to ask for narrow readings of terms such as "point sources," "subject to permits," and, especially, "not inconsistent with"—and the appellate courts have begun to comply.⁸ As a result, and as we previously wrote in this publication, the regulated community has "no easy path to dismissal or summary judgment for RCRA citizen suits relating to [CWA] non-point sources or unpermitted discharges."⁹

The latest lawsuit to attack RCRA's non-duplication exclusions is *Tennessee Riverkeeper*. In *Tennessee Riverkeeper*, the court denied motions to dismiss a RCRA endangerment claim targeting, among other things, "industrial discharges which are point sources" in compliance with a NPDES permit,¹⁰ *i.e.*, discharges that appeared to be excluded from regulation under RCRA. The court has not yet delivered its final verdict on this issue, but, at least for the time being, the court's language suggests that the wall between RCRA and the CWA may be nothing but rubble.

The result, we believe, is inconsistent with the plain language and purpose of the RCRA exclusions as well as EPA guidance, and invites needless and duplicative RCRA litigation over matters within the express domain of the CWA. In this article, we contrast the *Tennessee Riverkeeper* decision with the language and intent of the RCRA non-duplication provisions, and offer the regulated community recommendations that may help defend against future endangerment claims.

I. RCRA's Two Anti-Duplication Exclusions

A. RCRA's Point Source Exclusion

One of the predicates for a RCRA endangerment claim is that the defendant must have "contributed or [be] contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the

environment."¹¹ In order to be a "hazardous waste," a material must first meet the definition of "solid waste."¹² Accordingly, if something does not meet the definition of "solid waste," then it cannot be the subject of an endangerment claim.

Solid waste is generally an inclusive term, but it explicitly excludes "industrial discharges which are point sources subject to" NPDES permits¹³ (which we refer to as the "Point Source Exclusion"). As courts have recognized, the Point Source Exclusion's "purpose . . . is to avoid duplicative regulation" under both the CWA and RCRA.¹⁴

The U.S. Environmental Protection Agency (EPA) has further explained the meaning of "subject to" a NPDES permit, which proved to be a significant issue in *Tennessee Riverkeeper*. According to 1995 EPA guidance on the Point Source Exclusion (EPA Guidance), "subject to" should be given its broadest possible interpretation: "EPA has consistently interpreted the language 'point sources subject to permits under [section 402 of the Clean Water Act]' to mean point sources that should have a NPDES permit in place, whether in fact they do or not."¹⁵

B. RCRA's Anti-Duplication Provision

RCRA also has a second exclusion to prevent duplicative regulation, the so-called "Anti-Duplication Provision":

Nothing in [RCRA] shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the [Clean Water Act], the Safe Drinking Water Act [42 U.S.C. 300f et seq.], the Marine Protection, Research and Sanctuaries Act of 1972 [16 U.S.C. 1431 et seq., 1447 et seq., 33 U.S.C. 1401 et seq., 2801 et seq.], or the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.] except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.¹⁶

The Anti-Duplication Provision has been a key target of RCRA endangerment claims, which have focused on narrowing the interpretation of the term "not inconsistent." If "not inconsistent" is interpreted broadly, any RCRA regulation of a NPDES-permitted discharge might be "inconsistent" with CWA regulation. That is, the permit might be viewed as an

⁷ 42 U.S.C. § 6972(a)(1)(B).

⁸ See *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500 (4th Cir. 2015).

⁹ Nelson D. Johnson & Eric A. Rey, *RCRA Citizen Suits and the Clean Water Act*, 27 ENVTL. L. IN N.Y. 39, 42 (Mar. 2016).

¹⁰ 2017 U.S. Dist. LEXIS 27435, at *6–23 (N.D. Ala. Feb. 10, 2017).

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

¹² 42 U.S.C. § 6903(5).

¹³ 42 U.S.C. § 6903(27). When the U.S. Environmental Protection Agency (EPA) promulgated its RCRA regulations, it too excluded "[i]ndustrial wastewater discharges that are point source discharges subject to regulation under section 402 of the Clean Water Act, as amended" from the definition of "solid waste." 40 C.F.R. § 261.4(a)(2).

¹⁴ *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1423 (7th Cir. 1990).

¹⁵ Memorandum from Michael H. Shapiro to Lisa K. Friedman regarding Interpretation of Industrial Wastewater Discharge Exclusion From the Definition of Solid Waste, at 2 (Feb. 17, 1995) (emphasis in original), <https://www3.epa.gov/npdes/pubs/owm607.pdf>.

¹⁶ 42 U.S.C. § 6905(a).

affirmative decision to regulate the pollutants named in the permit at the specified discharge limits, and also as an affirmative decision *not* to regulate unnamed pollutants or impose more stringent limits. This is consistent with the EPA Guidance admonition that discharges are excluded from RCRA regulation if they “should have a NPDES permit in place, whether in fact they do or not.”¹⁷

If “not inconsistent” is interpreted more narrowly, however, the permit could become only a regulatory floor, where plaintiffs are free to use RCRA to regulate any unnamed pollutants and impose more stringent limits on the named pollutants. A narrow interpretation would, as a practical matter, defeat the purpose of the Anti-Duplication Provision by allowing plaintiffs to use RCRA to add to or modify the limits of NPDES permits regardless of whether the defendant might be in compliance with such permits.

Appellate courts have split over the appropriate breadth of “not inconsistent.” The Court of Appeals for the Fourth Circuit, in its decision last year in *Goldfarb v. Mayor & City Council of Baltimore*,¹⁸ came down squarely in favor of the narrowest possible interpretation, at least for non-point sources. According to the *Goldfarb* court, to be “inconsistent,” “the CWA must require something fundamentally at odds with what RCRA would otherwise require. . . . RCRA mandates that are just different, or even greater, than what the CWA requires are not necessarily the equivalent of being ‘inconsistent’ with the CWA.”¹⁹

In contrast, the Court of Appeals for the Second Circuit has favored a broader interpretation. In the 2008 case *Coon v. Willet Dairy, LP*, the Second Circuit found that RCRA’s Anti-Duplication Provision barred an endangerment claim where the “RCRA claims are based on the same activities and substances that the CWA [permit] covers,” and “[t]herefore, pursuant to [the Anti-Duplication Provision], the RCRA cannot apply to these activities and substances in this instance because any such application would be inconsistent with the CWA’s ‘permit shield.’”²⁰ The “CWA permit shield” refers to CWA Section 402(k), which generally bars government enforcement actions and citizen suits regarding discharges that are in compliance with a NPDES permit.²¹ As the U.S. Supreme Court has explained, “The purpose of [the CWA permit shield] seems to be . . . to relieve [permit holders] of having

to litigate in an enforcement action the question whether their permits are sufficiently strict.”²²

II. *Tennessee Riverkeeper v. 3M Co.*

A. Facts and Procedural History

In June 2016, Tennessee Riverkeeper filed suit against 3M Company (3M), BFI Waste Systems of Alabama, LLC (BFI), and the City of Decatur, Alabama, asserting a single RCRA endangerment claim stemming from the alleged contamination of the Tennessee River and groundwater by the disposal of hazardous and solid waste containing perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS), and related chemicals (collectively referred to as “perfluorinated chemicals” or “PFCs”).²³

Specifically, Tennessee Riverkeeper alleged that 3M’s manufacturing facility released and continued to release PFCs into the surface water and groundwater, including direct discharges from 3M’s on-site wastewater treatment plant and “indirect” discharges to the City’s wastewater treatment plant (WWTP) which, in turn, discharged PFC-contaminated wastewater to the Tennessee River.²⁴ Tennessee Riverkeeper further alleged that both BFI and the City owned and operated nearby landfills that had accepted and disposed of PFC-contaminated waste from 3M’s facility and had disposed of PFC-contaminated landfill leachate in the City’s WWTP.²⁵

Tennessee Riverkeeper argued, among other things, that the permitted point source discharges to the Tennessee River were causing imminent and substantial endangerment because their PFC concentrations exceeded EPA’s May 2016 drinking water health advisory level for PFOA and PFOS.²⁶ Tennessee Riverkeeper requested declaratory and injunctive abatement relief to address the alleged endangerment.

The three defendants moved to dismiss Tennessee Riverkeeper’s claims. 3M moved to dismiss the RCRA endangerment claim based upon its NPDES permit, arguing that such discharges “are excluded from the definition of solid waste under RCRA” under the Point Source Exclusion.²⁷ The City moved to dismiss

¹⁷ Memorandum from Michael H. Shapiro to Lisa K. Friedman regarding Interpretation of Industrial Wastewater Discharge Exclusion From the Definition of Solid Waste, at 2 (Feb. 17, 1995) (emphasis in original), <https://www3.epa.gov/npdes/pubs/owm607.pdf>.

¹⁸ 791 F.3d 500 (4th Cir. 2015).

¹⁹ 791 F.3d 500, 510 (4th Cir. 2015).

²⁰ 536 F.3d 171, 174 (2d Cir. 2008).

²¹ 33 U.S.C. § 1342(k).

²² *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

²³ *Tenn. Riverkeeper, Inc. v. 3M Co.*, 2017 U.S. Dist. LEXIS 27435, at *3–6 (N.D. Ala. Feb. 10, 2017).

²⁴ Compl. ¶ 34, *Tenn. Riverkeeper, Inc. v. 3M Co.*, No. 5:16-cv-01029-AKK (N.D. Ala. June 23, 2016).

²⁵ Compl. ¶ 35, *Tenn. Riverkeeper, Inc. v. 3M Co.*, No. 5:16-cv-01029-AKK (N.D. Ala. June 23, 2016).

²⁶ Compl. ¶¶ 45–46, *Tenn. Riverkeeper, Inc. v. 3M Co.*, No. 5:16-cv-01029-AKK (N.D. Ala. June 23, 2016).

²⁷ Defendant 3M Company’s Memorandum of Law in Support of Its Motion to Dismiss Plaintiff’s Complaint at 12, *Tenn. Riverkeeper, Inc. v. 3M Co.*, No. 5:16-cv-01029-AKK (N.D. Ala. July 29, 2016). 3M also moved to dismiss on the grounds that: (1) plaintiff’s claim was moot because 3M was already remediating its plant and adjacent property under a NPDES Remedial Action Agreement (NPDES RAA) with the Alabama Department of Environmental Management (ADEM); (2) the court should abstain because ADEM was managing the cleanup under the NPDES RAA and plaintiff’s claim was a collateral attack on ADEM’s decisions; and (3) the complaint failed to allege that 3M’s conduct constituted an imminent and substantial endangerment.

based on the Point Source Exclusion and the Anti-Duplication Provision,²⁸ with an additional twist—the City noted that its State Indirect Discharge Permit for its landfill explicitly allowed it to send leachate containing PFCs to its WWTP: “the permittee is authorized to introduce industrial wastes into the [publicly owned treatment works] (i.e., to the City’s WWTP) from the following outfalls: Landfill leachate containing Perfluorochemicals.”²⁹ BFI also moved to dismiss based on the Point Source Exclusion and the Anti-Duplication Provision.³⁰

In opposing the motions to dismiss, Tennessee Riverkeeper relied upon three points: (i) the liberal pleading standards at the motion to dismiss stage,³¹ (ii) arguments that the Point Source Exclusion did not apply to the defendants, and (iii) *Goldfarb*’s holding that the Anti-Duplication Provision was ineffective because there was no “direct conflict between the RCRA complaint and . . . alleged CWA permits.”³² Each of these points is discussed below.

B. The Court’s Decision to Deny the Motion to Dismiss

1. Deciding the Case on a Motion to Dismiss

The court agreed with Tennessee Riverkeeper that it would not be appropriate to reject the organization’s claims on a motion to dismiss, even though it appears the court could have done so. For example, in response to 3M’s arguments, the court stated: “While 3M may ultimately succeed in establishing [the applicability of the Point Source Exclusion],” because the matter was presented on a motion to dismiss and “in the absence of any controlling authority indicating that 3M’s discharges fit within the cited exception to the RCRA’s definition of ‘solid waste,’ the court must accept as true the Riverkeeper’s well-pleaded factual allegations.”³³

2. The Point Source Exclusion

The court also agreed with Tennessee Riverkeeper that it could not resolve the defendants’ motions based on the Point Source Exclusion because the court could not definitively eliminate the possibility that the PFC discharges might be solid waste.

Surprisingly, the court also was concerned that it could not eliminate the possibility that the discharges might be hazardous waste, stating that “[t]he crux of this dispute is whether PFOA and PFOS are, in fact, hazardous waste.”³⁴

The court’s concern about hazardous wastes seems misplaced since it is irrelevant to Tennessee Riverkeeper’s endangerment claim, which was the sole claim in the complaint. (The court also discusses whether accepting hazardous waste might violate BFI’s permit, but this is not an element of an endangerment claim.) As noted above, endangerment claims require an allegation of *solid waste* only, not hazardous waste. In any event, the hazardous waste status of the PFC-containing discharges should not have been in doubt. The complaint provides no grounds for finding that the discharges could have been hazardous waste.³⁵

The court did not resolve these concerns because it was unwilling to undertake the necessary statutory analysis in the absence of a clear definition of “industrial discharge” or “point source” in RCRA.³⁶ The court also may have been concerned because some of the discharges were indirect discharges to the City’s WWTP rather than direct discharges to the river. Regardless, these all appear to be issues of law that the court could have decided had it chosen to do so.

3. The Anti-Duplication Provision

The court completed its analysis by agreeing with Tennessee Riverkeeper that it could not resolve the defendants’ motions under the Anti-Duplication Provision. The court did so by adopting large portions of the Fourth Circuit’s decision in *Goldfarb*, namely, that the Anti-Duplication Provision applies only to “something fundamentally at odds with what RCRA would otherwise require.” In particular, “RCRA mandates that are just different, or even greater, than what the CWA requires are not necessarily the equivalent of being ‘inconsistent’ with the CWA.”³⁷

Tennessee Riverkeeper echoed the *Goldfarb* view that there should be separate “RCRA mandates” that apply to NPDES-permitted discharges, particularly where the permit does not regulate all the pollutants at issue:

²⁸ Brief by the City of Decatur, Alabama in Support of Its Motion to Dismiss at 12–15, *Tenn. Riverkeeper, Inc. v. 3M Co.*, No. 5:16-cv-01029-AKK (N.D. Ala. Aug. 8, 2016).

²⁹ Brief by the City of Decatur, Alabama in Support of Its Motion to Dismiss at 14, *Tenn. Riverkeeper, Inc. v. 3M Co.*, No. 5:16-cv-01029-AKK (N.D. Ala. Aug. 8, 2016).

³⁰ Defendant BFI Waste Systems of Alabama, LLC’s Memorandum in Support of Its Motion to Dismiss at 15–23, *Tenn. Riverkeeper, Inc. v. 3M Co.*, No. 5:16-cv-01029-AKK (N.D. Ala. July 29, 2016). Of note, BFI also argued that the court lacked subject matter jurisdiction over those claims that were a collateral attack on BFI’s RCRA permits to accept solid waste. *Id.* at 6–13.

³¹ Plaintiff Tennessee Riverkeeper’s Brief in Opposition to Defendant 3M Company’s Motion to Dismiss Plaintiff’s Complaint at 14–15, *Tenn. Riverkeeper, Inc. v. 3M Co.*, No. 5:16-cv-01029-AKK (N.D. Ala. Aug. 14, 2016).

³² Plaintiff Tennessee Riverkeeper’s Brief in Opposition to Defendant City of Decatur’s Motion to Dismiss Plaintiff’s Complaint at 7, *Tenn. Riverkeeper, Inc. v. 3M Co.*, No. 5:16-cv-01029-AKK (N.D. Ala. Aug. 23, 2016).

³³ 2017 U.S. Dist. LEXIS 27435, at *20 (N.D. Ala. Feb. 10, 2017).

³⁴ 2017 U.S. Dist. LEXIS 27435, at *9 (N.D. Ala. Feb. 10, 2017).

³⁵ Hazardous wastes are only those wastes that are listed by regulation, 40 C.F.R. § 261.3(a)(2)(ii), or have a hazardous characteristic, 40 C.F.R. § 261.3(a)(2)(i), and are not otherwise excluded, 40 C.F.R. § 261.3(a)(1).

³⁶ 2017 U.S. Dist. LEXIS 27435, at *12, *20 (N.D. Ala. Feb. 10, 2017).

³⁷ 2017 U.S. Dist. LEXIS 27435, at *14 (N.D. Ala. Feb. 10, 2017) (quoting *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 510 (4th Cir. 2015)).

[The City's] NPDES permit allows, not requires, it to discharge an unlimited amount of PFCs into the Tennessee River. Requiring it to remove these chemicals prior to discharge in no way conflicts with the requirements of its permit and, rather than conflicting with the requirements of the CWA, actually furthers the goals and purposes of the CWA. The RCRA action complements, not conflicts with, the CWA by supplying a standard ("imminent and substantial endangerment to health or the environment") which the CWA has, so far, failed to provide for PFCs.³⁸

Even though defendants appended their NPDES permits to their motions to dismiss, the court did not look for any "inconsistencies" between the permits and RCRA that might run afoul of *Goldfarb's* very narrow interpretation of the Anti-Duplication Provision. The court agreed with *Goldfarb* that "[t]he maze of cross-references to exhibits and interpretations of specific provisions within them makes this case particularly ill-suited to adjudication at the motion to dismiss stage."³⁹

C. Critique of the Court's Decision

As quoted previously, the U.S. Supreme Court has stated that the CWA has a permit shield, the purpose of which "seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict."⁴⁰ The position adopted by *Tennessee Riverkeeper*, like that of *Goldfarb* on which it relies, breaches that shield by finding (at least at the motion to dismiss stage) that RCRA endangerment claims may provide a standard co-equal with the standards in the CWA. Neither the language of RCRA nor the logic of anti-duplication compels this result, and it is inconsistent with the EPA Guidance.

1. The Point Source Exclusion and Anti-Duplication Provision

To deny the motion to dismiss, the court had to conclude that the alleged discharge was outside both the Point Source Exclusion and the Anti-Duplication Provision.

a. The Point Source Exclusion

The court declined to apply the Point Source Exclusion because it could not conclude that the defendants' discharges were "industrial discharges" and point sources subject to NPDES permits. The court's rationale appears to rest entirely on the perceived absence of any binding authority on the scope of the Point Source Exclusion,⁴¹ but this need not have prevented the court from deducing the meaning of these terms by statutory construction.

With respect to whether the defendants' discharges were "industrial," RCRA uses this term in reference to the CWA, and it is reasonable to look to the CWA for its meaning. The CWA and EPA have defined this term broadly to ensure that no discharges go unregulated. The CWA identifies "industrial users" as companies identified in the "Manufacturing" section of the Standard Industrial Classification Manual, Division D,⁴² plus others that the EPA may identify. EPA has used this authority to expressly define "industrial" for several different purposes,⁴³ in each case broadly enough to cover the defendants.

With respect to whether the defendants' discharges were "point sources," Tennessee Riverkeeper raised several arguments that appeared to be legal rather than factual. The first was that an indirect discharge to a publicly owned treatment works is not a point source with a NPDES permit.⁴⁴ This may be correct, but it also is irrelevant. At least some of the discharges were piped directly to the City's WWTP, and these discharges would not have been solid waste under the domestic sewage exclusion.⁴⁵ The other discharges, regardless of whether they were solid waste when they left their point of generation, would have ultimately reached the river as NPDES-permitted point sources. (We are assuming that this is the *only* way that the discharges reached the river; if they also, for example, leached from holding ponds, the analysis would be different.) To the extent that the NPDES-permitted discharges were excluded from RCRA regulation (as we argue below), the indirect discharges should have been excluded as well since the discharge allegedly causing the endangerment—and to which the indirect discharges allegedly contributed—was a NPDES-permitted discharge and thus not a solid waste.

Tennessee Riverkeeper's second argument was that the defendants' permits placed no limits on the PFCs in the

³⁸ Plaintiff Tennessee Riverkeeper's Brief in Opposition to Defendant City of Decatur's Motion to Dismiss Plaintiff's Complaint at 7, Tenn. Riverkeeper, Inc. v. 3M Co., No. 5:16-cv-01029-AKK (N.D. Ala. Aug. 23, 2016).

³⁹ 2017 U.S. Dist. LEXIS 27435, at *15 (N.D. Ala. Feb. 10, 2017) (quoting *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 510–511 (4th Cir. 2015)) (emphasis removed).

⁴⁰ *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

⁴¹ 2017 U.S. Dist. LEXIS 27435, at *12, *20 & *23 (N.D. Ala. Feb. 10, 2017).

⁴² 33 U.S.C. § 1362(18).

⁴³ 40 C.F.R. §§ 122.26(b)(14) (stormwater), 403.3(j) (indirect discharges).

⁴⁴ Plaintiff Tennessee Riverkeeper's Brief in Opposition to Defendant BFI's Motion to Dismiss Plaintiff's Complaint at 9, Tenn. Riverkeeper, Inc. v. 3M Co., No. 5:16-cv-01029-AKK (N.D. Ala. Aug. 12, 2016).

⁴⁵ Compl. ¶ 56, Tenn. Riverkeeper, Inc. v. 3M Co., No. 5:16-cv-01029-AKK (N.D. Ala. June 23, 2016); 40 C.F.R. § 261.4(a) (excluding from the scope of solid waste "Any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment").

discharges. This also is correct, and may or may not be relevant depending on whether the Point Source Exclusion is interpreted narrowly or broadly. The EPA Guidance clearly endorses a broad interpretation—the discharges would have been regulated even if there were no permit at all.⁴⁶

The CWA does not address this issue specifically, but it does define two terms relevant to it: “pollutant” and “discharge of a pollutant.” “Pollutant” refers to the individual components of a discharge, including:

dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.⁴⁷

“Discharge of a pollutant,” which means the same as “discharge of pollutants,” is defined as “the discharge of any pollutant” to regulated waters.⁴⁸

The simplest reading of these terms is that, as the term “discharge of pollutants” suggests, a single “discharge” may contain multiple “pollutants.” Since the Point Source Exclusion excludes from RCRA “discharges” and not just individual regulated pollutants, it should encompass the entire discharge (and all of its pollutants) regardless of whether there are discharge limits for each individual pollutant.

The *Tennessee Riverkeeper* court side-stepped these issues by refusing to rule, but it may have foreshadowed its ultimate decision. First, it found the *Goldfarb* opinion “persuasive” in its holding that “RCRA mandates that are just different, or even greater, than what the [Clean Water Act] requires are not necessarily the equivalent of being ‘inconsistent’ with the [Clean Water Act].”⁴⁹ And second, it specifically noted that the City’s NPDES-permitted discharges had no limits on PFCs: “Although the NPDES permit states that the City’s discharge of PFCs ‘shall be limited and monitored by the Permittee as specified below,’ the chart does not actually specify a limit on the discharge of PFCs.”⁵⁰

In summary, if the court ultimately does decide to enforce “RCRA mandates” as point source discharge limits, it would be contrary to the statutory definitions quoted above, contradict the EPA Guidance, and substantially defeat the congressional goal of walling off RCRA from discharges regulated by the CWA.

b. The Anti-Duplication Provision

The court also declined to find that the defendants’ discharges were within the scope of the Anti-Duplication Provision. As mentioned above, the court found “persuasive” *Goldfarb*’s argument that “RCRA mandates that are just different, or even greater, than what the [Clean Water Act] requires are not necessarily the equivalent of being ‘inconsistent’ with the [Clean Water Act].”⁵¹ The court also appeared concerned that the defendants’ NPDES permits did not limit PFC discharges.⁵²

This concern was unwarranted. A RCRA endangerment claim is not the only legal avenue for addressing the PFCs at issue. The CWA itself provides many other avenues, such as EPA’s powers to address imminent and substantial endangerment,⁵³ to require responsible parties to take action,⁵⁴ to take action itself and recover its costs,⁵⁵ to modify permits based on new information,⁵⁶ and to modify permits on a case-by-case basis to address failures to meet technology-based treatment standards.⁵⁷ Some of these actions are non-discretionary, so private plaintiffs should be able to sue EPA to compel it to act in appropriate circumstances.⁵⁸

2. Infeasibility of Using Endangerment Claims to Regulate CWA Discharges

As we have emphasized throughout this article, the Anti-Duplication Provision and Point Source Exclusion wall off the CWA from RCRA. Without this wall, plaintiffs can readily use RCRA endangerment claims to seek new or more stringent standards in NPDES permits, particularly in view of the low bar for pleading such claims.⁵⁹ It would, indeed, be like having a new

⁴⁶ Memorandum from Michael H. Shapiro to Lisa K. Friedman regarding Interpretation of Industrial Wastewater Discharge Exclusion From the Definition of Solid Waste, at 2 (Feb. 17, 1995) (“EPA has consistently interpreted the language ‘point sources subject to permits under [section 402 of the Clean Water Act]’ to mean point sources that should have a NPDES permit in place, whether in fact they do or not.” (emphasis in original)), <https://www3.epa.gov/npdes/pubs/owm607.pdf>.

⁴⁷ 33 U.S.C. § 1362(6).

⁴⁸ 33 U.S.C. § 1362(12).

⁴⁹ 2017 U.S. Dist. LEXIS 27435, at *14 (N.D. Ala. Feb. 10, 2017) (quoting *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 510 (4th Cir. 2015)).

⁵⁰ 2017 U.S. Dist. LEXIS 27435, at *22 n.6 (N.D. Ala. Feb. 10, 2017).

⁵¹ 2017 U.S. Dist. LEXIS 27435, at *14 (N.D. Ala. Feb. 10, 2017) (quoting *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 510 (4th Cir. 2015)).

⁵² See *supra* note 50 and accompanying text.

⁵³ 33 U.S.C. § 1364.

⁵⁴ 33 U.S.C. § 1321(e).

⁵⁵ 33 U.S.C. § 1321(c).

⁵⁶ 40 C.F.R. § 122.62(a)(2).

⁵⁷ 40 C.F.R. § 122.62(a)(11).

⁵⁸ 33 U.S.C. § 1365(a)(2).

⁵⁹ See, e.g., *Me. People’s Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 287–88 (1st Cir. 2006) (“To date, at least four of our sister circuits have construed [endangerment claims] expansively.”).

sheriff in town that could enforce discharge limits established under RCRA instead of under the CWA.

If court-imposed RCRA discharge limits are problematic from a policy perspective, they are even more so from a technical one. How would a court determine them? Agencies currently select discharge limits based on expert analysis of scientific research that has been subject to public notice and comment in regulatory or permit proceedings. Endangerment claims would compress this into a judicial decision based on the trial testimony of a few experts, a process that is unlikely to yield as reliable an outcome.

There is an alternative to all of this duplication, inefficiency, and uncertainty—a broad reading of the Point Source Exclusion and Anti-Duplication Provision consistent with the EPA Guidance and in furtherance of the U.S. Supreme Court’s explanation of the CWA permit shield. RCRA should not apply to (i) discharges subject to the CWA (whether or not they have a permit), (ii) NPDES-permitted discharges in their entirety (whether or not individual pollutants are regulated), or (iii) indirect discharges to NPDES-permitted treatment plants. Efforts to impose new or more-stringent regulations via endangerment claims should be viewed as inconsistent with the CWA and dismissed.

III. Where Does This Leave the Regulated Community?

Notwithstanding the arguments presented above and by the defendants in *Tennessee Riverkeeper*, courts in the Fourth Circuit (where *Goldfarb* establishes the precedent) and elsewhere may continue to take a narrow view of RCRA’s anti-duplication exclusions. Accordingly, we recommend that industrial users who might be at risk of endangerment claims revisit the completeness of their NPDES permit files.

This risk may be small for industrial users whose NPDES permits have discharge limits for all of the discharged pollutants (even though, in theory, plaintiffs could use endangerment claims to try to lower those limits). But the risk may be larger for industrial users whose permits lack discharge limits for one or more pollutants for which the discharge is significant in amount or toxicity. To mitigate this risk, the best defense would be a permit with a discharge limit for the applicable pollutants. This is not always practical, however, and overburdened agencies may be unwilling to take the time to go through the permitting process for the sake of discharge limits that the agency may deem unnecessary.

A less burdensome alternative is to make sure that the agency has a complete list of the pollutants in a discharge and the pollutants’ concentration ranges. This does not provide the permittee with as much protection as a discharge limit, but it does provide support for the argument that the agency knew what pollutants were in the permittee’s discharge, and affirmatively chose not to regulate some of them.

At the end of the day, the regulated community’s best defense would be to persuade courts to follow the EPA Guidance and the

Second Circuit’s decision in *Willet Dairy*, and to reject RCRA endangerment claims on motions to dismiss. As *Tennessee Riverkeeper* shows, however, the regulated community may also want to consider other options such as those recommended above.

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LEGAL DEVELOPMENTS

ASBESTOS

Appellate Division Agreed That Pump Manufacturer Should Be Kept in Asbestos Action

In an asbestos personal injury action, the Appellate Division, First Department, affirmed the denial of a manufacturer’s motion for summary judgment. Noting that the manufacturer could not rely on the decedent’s inability to identify its pumps as the source of his exposure to asbestos, the First Department said that the manufacturer had failed to establish prima facie that the plaintiff’s decedent could not have been exposed to its asbestos-containing products. In addition, the court said that the plaintiffs’ evidence that the manufacturer’s pumps were present on the ship on which the decedent worked as a boiler tender fireman raised an issue of fact. *Matter of New York City Asbestos Litigation (Krok v. AERCTO International, Inc.)*, 146 A.D.3d 700, 44 N.Y.S.3d 911 (1st Dept. 2017).

State Supreme Court Declined to Apply “Flexible Approach” to Successor Liability in Asbestos Action

The Supreme Court, New York County, dismissed a company from an asbestos personal injury action after finding that the plaintiffs had failed to raise an issue of fact to establish the company’s liability as a successor to a company that manufactured asbestos-containing brakes. The plaintiffs argued that the court should apply a “flexible approach” to determining whether an asset purchase constituted a de facto merger even in the absence of issues of fact regarding continuity of ownership, one of the factors required to establish a de facto merger. The court concluded that continuity of ownership was the “touchstone” for establishing that a de facto merger had taken place, even in asbestos cases. The court indicated that “any finding that other indicia could substitute for continuity of ownership must come from the appellate courts.” Finding that the company had met its burden to demonstrate that there was no continuity of ownership and that the plaintiffs failed to raise an issue of fact on this issue, the court granted summary judgment to the defendant. *Matter of New York City Asbestos Litigation (Montanez v. American Honda Motors Co.)*, 2017 N.Y. Misc. LEXIS 493 (Sup. Ct. New York County Feb. 8, 2017).