

Limiting Localized Application Of RCRA Citizen Suits

Law360, New York (March 13, 2012, 1:31 PM ET) -- A federal district court judge in Nevada has suggested that the Commerce Clause of the U.S. Constitution bars application of the Resource Conservation and Recovery Act (RCRA) to a localized plume of contaminated groundwater.

The case, *Voggenthaler v. Maryland Square LLC*, presents a new twist on the constitutionality of the citizen suit provision of the RCRA, which had not previously been under serious dispute. In addition, the court's opinion could assist companies facing lawsuits requiring the cleanup of contaminated sites.

The citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B), permits private citizens to seek injunctive relief against any person "who has contributed or is 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."

In *Voggenthaler*, the plaintiffs alleged that a contaminated groundwater plume, which resulted from use of the once-common chemical perchloroethylene (PCE) at a former dry cleaning facility, migrated offsite and beneath their nearby homes. The plaintiffs filed suit against the former owners of the dry cleaners and the owners of the shopping mall property on which the dry cleaners was located, and the defendants filed claims against a number of third-party defendants.

One of those third-party defendants, Sears Roebuck and Co., filed a motion to dismiss the *Voggenthaler* complaint, arguing that the court lacked subject matter jurisdiction over the RCRA citizen suit because the facts of the case did not fall within the Commerce Clause authority granted to Congress by the U.S. Constitution.

The U.S. Supreme Court has held that the commerce power allows Congress to regulate the use of the channels of interstate commerce, the instrumentalities of interstate commerce and activities that substantially affect interstate commerce. Though this regulatory power is broad, the Supreme Court has held that it is "not without effective bounds."

The court's recent Commerce Clause jurisprudence has focused on the third category of regulation — activities that “substantially affect” interstate commerce — and the court has demonstrated a willingness to invalidate congressional legislative efforts that have too tenuous a connection to interstate matters.

In *Voggenthaler*, Sears argued that the case did not “substantially affect” interstate commerce because it involved a purely local matter: a suit seeking to compel remediation of a PCE groundwater plume that:

1. Resulted from waste disposal activities that ceased more than 10 years ago;
2. Was solely contained within several square blocks of Las Vegas; and
3. Endangered the plaintiffs within their homes.

Sears argued that on these facts, the connection between the localized groundwater plume and interstate commerce was too tenuous to support the application of the RCRA's citizen suit provision.

In an order dated Feb. 4, 2011, District Judge Robert C. Jones agreed with Sears, stating that “the contamination is a local and isolated plume that does not affect [interstate commerce]” and that the court therefore lacked subject matter over the RCRA claims. However, due to the unusual procedural posture of the motion, the court held that it could not substantively determine the merits of the motion because another party had filed a notice of appeal of the court's prior summary judgment.

The court therefore denied Sears' motion to dismiss without prejudice.

Since that ruling, Sears has been dismissed from the *Voggenthaler* action on other grounds. Nonetheless, other parties have pressed the Commerce Clause issue before the court.

In opinions dated July 26, 2011, and Dec. 7, 2011, the court repeated its view that the Commerce Clause deprives it of subject matter jurisdiction over plaintiffs' RCRA citizen suit, but reiterated that it cannot rule on the issue in light of the pending appeal. Instead, the court invited the parties to brief both the Commerce Clause and jurisdictional issues before the U.S. Court of Appeals for the Ninth Circuit.

Despite the limited precedential value of the *Voggenthaler* court's position on the Commerce Clause, the decision is nonetheless significant. Courts previously have upheld Congress's enactment of the RCRA under the commerce power, but *Voggenthaler* is apparently the first decision to question the applicability of the RCRA's citizen suit provision to entirely localized areas of contamination resulting from hazardous waste disposal activities that have long since ceased.

RCRA citizen suits have provided an important action-forcing opportunity for plaintiffs: not only can plaintiffs seek injunctions ordering responsible parties to remediate contaminated properties, but successful plaintiffs can also recover their litigation costs, including attorneys' fees and expert fees.

A substantive holding that accepts the *Voggenthaler* court's reasoning could be a significant defense in RCRA citizen suits, since contaminated soil and groundwater at issue in such cases often does not cross state lines.

The Commerce Clause argument may face an uphill battle in the Ninth Circuit.

The Supreme Court has long held that Congress may regulate even noneconomic local activity under its Commerce Clause authority if that regulation is a necessary part of a larger scheme of economic regulation. And the Supreme Court also has held that the RCRA directs the U.S. Environmental Protection Agency to establish a comprehensive “cradle-to-grave” system that regulates the generation, transport, treatment and disposal of hazardous waste.

Lower courts have held that Congress recognized the nexus between commercial activities and hazardous waste generation and disposal in passing the RCRA. However, the Voggenthaler court’s interpretation of the RCRA Commerce Clause issue depends critically upon separation of the “cradle” (the commercial activities that involved use of PCE) from the “grave” (the localized groundwater plume that resulted from those historic activities).

Whether the Ninth Circuit will accept this distinction remains to be seen.

In the meantime, companies faced with citizen suits under the RCRA in connection with purely local contamination sites may want to examine whether the facts of their case support a defense based on the Commerce Clause. Because challenges to a federal court’s subject matter jurisdiction generally can be raised at any time, defendants may find the issue worthy of serious consideration.

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