

Subject Matter Jurisdiction Under RCRA: Testing the Limits of the Commerce Clause in a Citizens' Suit

Toxic Tort and Environmental Law Update

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Courts have traditionally construed federal jurisdiction of environmental statutes expansively, consistent with their remedial intent. However, recent opinions in *Voggenthaler v. Maryland Square, LLC*, Case 2:08-cv-1618 (D. Nevada), suggest that there may still be room to challenge subject matter jurisdiction where the alleged RCRA violations have only intrastate effects and do not involve commerce.

In *Voggenthaler*, plaintiff homeowners alleged that a former dry cleaner in the defendants' mall discharged toxins into groundwater that caused a contaminated plume under the plaintiffs' properties. The complaint alleged that the plume extended only to a limited area within Nevada. The plaintiffs brought a citizens' suit under the Resource Conservation and Recovery Act (RCRA), alleging that disposal of hazardous waste (the release of toxins) had caused an "imminent and substantial endangerment" under the statute. The mall owners then impleaded Sears and other parties for contribution under CERCLA, alleging that those defendants had contributed to the contamination in the plume. Sears moved to dismiss the plaintiffs' RCRA claim for lack of subject matter jurisdiction.

Both sides agreed that the Commerce Clause of the U.S. Constitution permitted Congress to regulate "activities that substantially affect interstate commerce," citing *United States v. Lopez*, 514 US. 549 (1995), but they disagreed on whether that authority encompassed the allegations of the complaint under RCRA. Sears argued, among other things, that the plume did not cross state lines, which made the matter "truly local." Plaintiffs relied heavily on *Gonzales v. Raich*, 545 U.S. 1 (2005), for the proposition that, when Congress finds that a class of activities has a substantial effect on interstate commerce, it can regulate purely local activities that are part of that class. In *Gonzales*, the Court held that the federal enforcement of the statute prohibiting cultivation of marijuana was a

valid exercise of power under Commerce Clause, even though the marijuana at issue was grown for non-commercial personal medical use.

In February 2011, the District Court agreed with Sears that the "local and isolated" plume did not affect interstate commerce, so the subject matter of the RCRA claim exceeded the authority granted by the Commerce Clause. However, because another order affecting the issue was on appeal, the court denied the motion without prejudice and directed the parties to raise the issue in the Ninth Circuit Court of Appeals. The court repeated its direction to the defendants in subsequent opinions in July and December 2011. After Sears was dismissed from the case on other grounds, a remaining defendant raised subject matter jurisdiction in the Circuit Court based on the local nature of the plume. Meanwhile, the plaintiffs argued in the Ninth Circuit that other courts have rejected challenges to subject matter jurisdiction under CERCLA where the conduct allegedly had no interstate effects, so the same result should apply to claims under RCRA.

There is no precedential opinion in the case, and it is not clear whether or how the Ninth Circuit will rule on the jurisdiction issue. Furthermore, courts have held that interstate effects are not necessary to establish subject matter jurisdiction in an enforcement action under section 7003 of RCRA where a strong federal interest can be shown. Nevertheless, the finding by the District Court in *Voggenthaler* that it lacked subject matter jurisdiction should encourage defendants to consider a motion to dismiss a RCRA citizen suit complaint on the pleadings where there are no allegations of interstate effects. Even when there are such allegations, defendants should promptly develop expert testimony to challenge the allegations so a motion to dismiss may be made as early as possible, perhaps with a stay of further proceedings until jurisdiction is settled.

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