

Environmental

COMMENTARY

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The RCRA Citizen Suit As an Alternative to the CERCLA Contribution Action

By James G. Derouin, Esq., Fredric D. Bellamy, Esq., Nicholas J. Wallwork, Esq. and Mark E. Freeze, Esq.*

For years, private parties have been using the federal Comprehensive Environmental Response, Compensation and Liability Act to recover costs of cleaning up contamination. The U.S. Supreme Court in *Cooper Industries v. Aviall Services* has raised considerable doubt as to the continued viability of this approach.¹ Specifically, the court in *Cooper* ruled that private parties could not bring suit under CERCLA's contribution provision absent government enforcement.²

The Supreme Court did not address whether private parties may use CERCLA's liability provision to recover their response costs, and court decisions on this question post-*Cooper* have been mixed.³ As a result, private entities conducting cleanup activities have been increasingly considering the use of the Resource Conservation and Recovery Act's citizen suit provision as an alternative vehicle for requiring cleanup. Indeed, since *Cooper*, there has been a considerable uptick in the number of RCRA citizen suit claims being filed.

A RCRA citizen suit may be brought against one who contributed to the handling, storage, treatment, transportation or disposal of any solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment.⁴ Importantly, before bringing suit, a plaintiff must satisfy the notice requirements contained in the statute.⁵

In addition to providing more certainty for private parties, the RCRA citizen suit has certain other advantages over a CERCLA contribution claim. First, and of no small importance, the RCRA citizen suit provision allows for the recovery of attorney fees. The statute authorizes courts to award "costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or

substantially prevailing party whenever the court determines that such an award is appropriate."⁶ Under CERCLA, in contrast, it has been clear since at least 1994, when the Supreme Court ruled in *Key Tronic Corp. v. United States*, that private party attorney fees were for the most part not recoverable.⁷

A second advantage of a RCRA citizen suit over a CERCLA contribution action is that the RCRA citizen suit can be used to address petroleum contamination.⁸ In contrast, petroleum is expressly excluded from the CERCLA statutory definition of "hazardous substance."⁹

A third advantage is that a private party cleanup required by a RCRA citizen suit does not have to be consistent with the National Contingency Plan. Under CERCLA, cleanup costs are not recoverable unless the cleanup action was consistent with these rather complex regulations governing the cleanup process.¹⁰

Finally, a plaintiff in a RCRA citizen suit may obtain an injunction requiring the defendant to clean up the contamination. In a RCRA citizen suit, the court has the power to restrain the person contributing to the contamination or to order the person to take such action as may be necessary.¹¹ In fact, a plaintiff in a RCRA citizen suit action is limited to injunctive relief and may not recover cleanup costs.¹²

However, injunctive relief actually accelerates the defendant's financial contribution to the cleanup by requiring the defendant's participation in the remediation. Under CERCLA, a plaintiff must actually incur cleanup costs in the first instance and then sue to obtain reimbursement.

Of course, there are some disadvantages of the RCRA citizen suit as compared to the CERCLA contribution action.

The first and most important disadvantage is that the RCRA citizen suit provision may contain a more onerous causation requirement. Specifically, the statute provides that the plaintiff must prove that the defendant “has contributed to ... or is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste” that may present an imminent or substantial endangerment.¹³ That is, there arguably must be some causal link between the defendant’s waste and the imminent and substantial danger at issue.

In contrast, under CERCLA it is well recognized that a plaintiff does not have to prove a causal link between a defendant’s specific waste and the response costs at issue.¹⁴ On the other hand, under the RCRA citizen suit provision, a defendant does not need to fit within the specific CERCLA categories of owner, operator, transporter or arranger in order to be held liable. Rather, any person who has contributed to the past or present handling, storage, treatment, transportation or disposal of waste that may present an imminent or substantial endangerment may be held liable. This could include, for example, a designer and manufacturer of an underground storage tank that leaked.¹⁵

Additionally, a RCRA citizen suit plaintiff must prove that conditions exist that “may present an imminent and substantial endangerment to health or the environment.”¹⁶ There is no such requirement for the CERCLA plaintiff. Indeed, some courts have found that a plaintiff had established its *prima facie* case under CERCLA, but had failed to establish that an imminent hazard existed.¹⁷

On the other hand, it is important to point out that the word “may” in the RCRA citizen suit provision lowers the threshold of proof from what otherwise would be required. The RCRA citizen suit plaintiff must only show that there is a potential for an imminent threat of serious harm.¹⁸

In addition, the word “endangerment” has been construed to mean that the plaintiff must only show that there is a threatened or potential harm, not actual harm.¹⁹ The word “substantial” means only that there must be a reasonable cause for concern that people or the environment would be exposed to a risk of harm if the endangerment was left unabated.²⁰ The plaintiff does not have to show that the defendant exceeded some governmental standard.²¹

Another potential disadvantage is that a RCRA citizen suit plaintiff, prior to commencing suit, must provide written notice of the endangerment to the defendant, the Environmental Protection Agency and the environmental

agency for the state in which the endangerment exists.²² In most cases, the plaintiff must wait 90 days after giving notice before commencing suit. These notice requirements are jurisdictional, and any lawsuit would likely be dismissed if the plaintiff does not comply with the requirements.²³

In addition, generally, the plaintiff may not file suit if the state or federal environmental agency is acting through enforcement or cleanup activities to address the endangerment in certain ways.²⁴ This bar only applies if the action is proceeding diligently. Thus, for example, if the defendant has missed a deadline for the submission of a work plan, then the bar may be held not to apply.²⁵ Of course, CERCLA has no similar prohibitions and conditions to a plaintiff filing suit.

The fact that the RCRA citizen suit provides a more certain vehicle than CERCLA contribution actions for private parties to require cleanup may in many cases outweighs any potential disadvantages of such a claim.

Notes

¹ *Cooper Indus. Inc. v. Aviall Servs. Inc.*, 125 S. Ct. 577 (2004).

² 125 S. Ct. at 583.

³ See *Viacom Inc. v. United States*, 2005 WL 1902849, *3 (D.D.C. July 19, 2005) (summarizing post-*Aviall* case law).

⁴ 42 U.S.C. § 6972(a)(1)(B).

⁵ A separate RCRA citizen suit provision provides that suit may be brought against one who is in violation of a permit, standard, regulation, condition, requirement or order that has become effective under RCRA. 42 U.S.C. § 6972(a)(1)(A).

⁶ 42 U.S.C. § 6972(a).

⁷ 114 S. Ct. 1960 (1994).

⁸ See e.g., *Dydio v. Heston Corp.*, 887 F. Supp. 1037, 145-48 (N.D. Ill. 1995); *Lyle L.P. v. Land O'Lakes Inc.*, 877 F. Supp. 476, 482 (D. Minn. 1995).

⁹ 42 U.S.C. § 9601(14).

¹⁰ 42 U.S.C. § 9607(a).

¹¹ 42 U.S.C. § 6972(a).

¹² *Mehrig v. KFC Western Inc.*, 516 U.S. 479 (1996).

¹³ 42 U.S.C. § 6972(a)(1)(B).

¹⁴ See, e.g., *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992).

¹⁵ *Agric. Excess & Surplus Ins. Co. v. A.D.B. Tank & Pump Co.*, 1996 WL 11122, *3 (N.D. Ill. Jan. 8, 1996).

¹⁶ 42 U.S.C. § 6972(a)(1)(B).

¹⁷ *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987).

¹⁸ *Interfaith Cmty. Org. v. Honeywell Int'l*, 399 F.3d 248, at 259 (3d Cir. 2005); *Parker v. Scrap Metal Processors Inc.*, 386 F.3d 993, 1014-15 (11th Cir. 2004).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Interfaith Cmty. Org.*, 399 F.3d at 260. *But see, Price v. U.S. Navy*, 818 F. Supp. 1323 (C.D. Cal. 1992).

²² 42 U.S.C. § 6972(b)(2)(A).

²³ *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 308-9 (1989); *Covington v. Jefferson County*, 358 F.3d 626, 636 (9th Cir. 2004).

²⁴ 42 U.S.C. § 6972(b)(2)(B).

²⁵ See *Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 183 n. 1 (M.D. Pa. 1988).

* James G. Derouin, Fredric D. Bellamy and Nicholas J. Wallwork are partners with Steptoe & Johnson LLP in Phoenix. Mark E. Freeze is special counsel to the firm. Mr. Derouin can be reached at jderouin@steptoe.com. Mr. Bellamy can be reached at fbellamy@steptoe.com. Mr. Wallwork can be reached at nwallwork@steptoe.com. Mr. Freeze can be reached at mfreeze@steptoe.com.