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## Court Rejects Attempt to Expand RCRA to Diesel Exhaust

By Michael Steel, Chris Carr and Travis Brandon

On May 29, 2012, the Central District of California dismissed a lawsuit filed by a number of environmental groups seeking to apply the Resource Conservation and Recovery Act (“RCRA”) to any gaseous emissions that have the potential to form a solid or liquid residue.

In *Center for Community Action and Environmental Justice, et al. v. Union Pacific Corp., et al.*,<sup>1</sup> the district court considered whether RCRA—a statute that governs the storage, treatment, transportation, and disposal of solid and hazardous waste—could be applied to diesel particulate matter (“DPM”) emitted by locomotives, trucks, and other equipment at various railyards across California. The court held that RCRA does not apply to diesel exhaust both because DPM is not a “solid or hazardous waste” under RCRA and also because Congress intended the Clean Air Act (“CAA”) to regulate diesel emissions comprehensively.

### BACKGROUND

On February 1, 2012, three environmental groups, including NRDC, filed suit against Union Pacific Railroad Company and BNSF Railway Company, alleging that diesel emissions from 16 separate railyards across California violate RCRA because the trains, trucks, and other vehicles present at the railyard emit diesel exhaust that contains DPM. The plaintiffs argued that RCRA should apply to diesel emissions because even though DPM is emitted as a gas in diesel exhaust, it has the potential to settle onto land as solid particles.

In addition, the plaintiffs argued that the district court should apply RCRA to DPM in this case because diesel exhaust from locomotives and railyards falls into a “loophole” created by the overlap of two sections of the CAA. Under the CAA, the federal EPA has no authority to regulate indirect sources, which include facilities that attract mobile vehicles, such as shopping centers.<sup>2</sup> The CAA leaves such regulation to the discretion of the states, which are authorized to implement an indirect source review program of their own design. However, another provision of the CAA prohibits states from adopting or enforcing emissions standards for “[n]ew locomotives or new engines used in locomotives.”<sup>3</sup> The plaintiffs argued that these two statutes together left diesel emissions “wholly unregulated” by either state or federal government under the CAA, and that RCRA should therefore apply to fill the “gap.”

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<sup>1</sup> CV 11-08608 SJO (May 29, 2012).

<sup>2</sup> 42 U.S.C. § 7410(a)(5)(A)(ii).

<sup>3</sup> 42 U.S.C. § 7543(e)(1)(B).

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## THE DISTRICT COURT'S DECISION

The court decisively rejected both of the arguments advanced by the plaintiffs.

**First**, the court found that the plaintiffs' argument that DPM could be considered "solid" waste would stretch "the boundaries of the term to a point where it retains little meaning." The court noted that "[u]nder Plaintiffs' proposed definition of solid waste, any gas containing compounds, regardless of size, that can be aggregated to form a solid or liquid substance would qualify as a solid waste under RCRA." Regarding DPM in particular, the court explained that "a finding that emission of diesel exhaust constitutes disposal of solid waste in this instance would nonetheless bring every diesel-burning vehicle within the scope of RCRA." As the court found, applying RCRA to DPM would disregard the clear congressional intention to regulate diesel exhaust through the CAA: "Congress and the EPA have created complex schemes to address diesel exhaust directly through the CAA."

The court further disagreed with the plaintiffs' contention that the court's decision would allow polluters to avoid RCRA liability simply by aerosolizing any liquid waste product. The court found that RCRA applies to the handling and disposal of all solid and liquid waste, and would therefore apply to solid or liquid waste that was subsequently aerosolized. But in this case, the court found, the emissions were from the burning of diesel fuel, not solid or liquid waste. Diesel emissions are created as a gas—not as a solid or liquid waste product—and thus the CAA applied.

**Second**, the court found that the plaintiffs' argument that railyard diesel emissions are left "wholly unregulated" by the CAA due to a "loophole" in the statute was "disingenuous" and incorrect. As the court explained, while it is true that under the CAA "railyards are not separately regulated as an indirect source of pollution" it is still the case that "every direct source of DPM in Defendants' railyards is regulated by the CAA." In addition, the court found that the CAA's clear statutory prohibition on federal regulation of indirect sources of pollution was not an oversight but rather the result of a "series of reasoned and calculated decisions by Congress and the EPA." Thus, the court determined, "It would be unreasonable to assume that even though Congress expressly prohibited federal indirect source regulation under the CAA, it implicitly intended to regulate indirect source emissions through the citizen suit provision of RCRA."

Ultimately, the court concluded that the plaintiffs' suit was an invitation for the court to implement an ad hoc indirect source review program for railyards through RCRA, an invitation that the court declined to accept: "[I]t is not for the Court to create a regulatory scheme where one does not exist or to apply a strained construction of RCRA to an area that Congress has chosen to regulate through the CAA."

## SIGNIFICANCE

The district court's decision in this case conclusively rejected an argument that would have expanded potential RCRA liability not just to all diesel exhaust emissions, but to any gaseous emissions that could theoretically condense or settle as solid or liquid matter. In addition, the court reaffirmed that Congress intended to address emissions solely and comprehensively through the CAA, and declined to follow an approach that would have allowed the application of RCRA to emissions wherever a court perceived a "gap" in the CAA's coverage.

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