Top 10 Questions to Consider If Sued Under RCRA's Citizen Suit Provisions

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No longer only a tool of public interest groups, an ever-expanding group of plaintiffs – including commercial plaintiffs – are using the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, to address alleged regulatory violations, seek cleanup of wastes alleged to be causing an imminent and substantial endangerment, and pursue fee awards. In addition, RCRA citizen suits have moved beyond traditional allegations of subsurface wastes migrating to soil and groundwater, and may include claims such as vapor intrusion. In light of this diversified landscape of plaintiffs and media, defendants should consider the following key questions when sued under RCRA's citizen suit provisions.

1. **Do deficiencies in plaintiff's pre-suit notice provide grounds for dismissal?**

RCRA requires 60-day notice for suits brought under § 6972(a)(1)(A) (violation of specific RCRA requirement), and 90-day notice for suits brought under § 6972(a)(1)(B) (imminent and substantial endangerment). RCRA provides an exception for the notice period for citizen suits alleging violations of Subtitle C hazardous waste management provisions, which can be filed immediately after providing notice. The notice requirement reflects the preference for the government to take the lead enforcement role (rather than citizens), and serves to provide the defendant with adequate information to understand basis of the citizen suit. Evaluate whether the notice satisfies the statutory requirements of § 6972(b), and if applicable, the regulatory requirements of 40 C.F.R. § 254.3. If not, consider a motion to dismiss. Courts routinely dismiss RCRA citizen suits for failure to meet these requirements. In addition, check the law in your jurisdiction for other notice-based grounds for a motion to dismiss. For example, the U.S. Court of Appeals for the Second Circuit has affirmed dismissal where plaintiff's notice only identified waste practices, but did not identify the specific contaminants at issue. Dismissal due to lack of notice typically is without prejudice to refile after proper notice is given, but dismissal may provide strategic or procedural advantages.

2. **Has plaintiff alleged an injury sufficient to satisfy constitutional standing requirements?**

A plaintiff must meet the standing requirements of Article III of the U.S. Constitution in order to have standing to sue in federal court. An invasion of a concrete and particularized legally protected interest that is actual or imminent is required to establish standing; the injury may not be conjectural, hypothetical, or too temporally remote. In the RCRA context, standing defenses can be asserted, for example, where there are allegations of an injury to property the plaintiff no longer owns, where the claimed injury is based on future, speculative development plans, or a corporation claims its aesthetic interests have been injured. In such situations, an early motion for summary judgment may expose a plaintiff's inability to show actual harm, although plaintiffs' claims of standing are often viewed liberally.

3. **Is plaintiff's claimed injury redressible by RCRA?**

An injury must also be redressible for a plaintiff to have constitutional standing. RCRA provides only forward-looking injunctive relief; not monetary compensation for past costs. Accordingly, suits seeking such compensation are not redressible under RCRA, and thus lack standing. Additionally, where a remediation plan is in place and cleanup is ongoing, the plaintiff may lack an injury needing redress because a court cannot order superfluous relief.

4. **Is there government action that bars the suit?**

Certain RCRA citizen suits are barred where the U.S. Environmental Protection Agency ("EPA") or the state is "diligently prosecuting" a RCRA or Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") action. Plaintiffs have the burden of proving that prosecution is not diligent. This burden is heavy as a presumption of diligence attaches to government prosecution of actions; complaints about the government's prosecution schedule or strategy generally will not suffice in themselves. Some courts have found that consent decrees and their enforcement amount to diligent prosecution.

5. **Is there an action under CERCLA that bars the suit?**

Certain CERCLA removal and remedial actions will bar a RCRA citizen suit. These CERCLA actions include: (i) state or federal government engagement in a CERCLA § 104 removal action; (ii) federal or state government incurrence of costs to initiate a CERCLA § 104 remedial investigation/feasibility study ("RI/FS") combined with diligent remedial action; and (iii) a court order (including a consent decree) or an administrative order under CERCLA § 106 or RCRA § 7003, pursuant to which a responsible party is "diligently" conducting a removal action, RI/FS, or a remedial action. RCRA suits are also precluded if they "challenge" a removal or remedial action selected under CERCLA § 104. Courts generally find any actions consistent with initial investigations, monitoring, initial clean up, or negotiation or entry of a consent decree will constitute a CERCLA removal action sufficient to preclude a RCRA claim. Remedial actions barring RCRA claims generally consists of those actions consistent with the permanent remedy.

6. **Is the plaintiff alleging entirely past regulatory violations, or violations of superseded federal regulations?**

Many RCRA citizen suits concern activities that occurred several decades ago. If a suit alleges regulatory violations based on claims of entirely past conduct (*i.e.*, the violations are not ongoing), such claims should be dismissed. Courts have also ruled that a plaintiff may not bring suit to enforce federal RCRA regulations where they have been superseded by an authorized state program. (However, suits seeking enforcement of *state* regulations issued pursuant to a state program

authorized under RCRA are typically allowed to proceed in federal court). All claims of regulatory violations should be scrutinized in light of these simple arguments, which can be applied to quickly narrow the claims in a RCRA citizen suit.

7. Do primary jurisdiction or abstention doctrines provide grounds for a stay, or dismissal?

The doctrines of primary jurisdiction and abstention have seen success as defenses to RCRA citizen suits in some jurisdictions. Abstention doctrines arise out of concern for the proper jurisdictional balance between state and federal courts, and can provide a basis for dismissal of a federal court complaint. Defendants in RCRA citizen suits most frequently invoke the doctrine known as *Burford* abstention, which applies in situations where a federal suit will interfere with a state administrative agency's resolution of difficult and consequential questions of state law or policy doctrine. While some courts have rejected the application of *Burford* abstention to RCRA citizen suits, the argument has seen more consistent success in suits challenging agency permitting, licensing or siting decisions under state law.

Under the doctrine of primary jurisdiction, a federal court may stay proceedings where a claim involves issues within the special competence of an administrative body. Primary jurisdiction has been found applicable where: a consent order with the state completely overlapped with the relief sought by plaintiff's RCRA claims; where EPA investigation and remediation had been diligent and ongoing for many years, and injunctive relief ordered by court could be conflicting; and where a state agency had extensive involvement in addressing alleged contamination and federal court intervention could result in delay of state agency response or substantial duplication of effort. Courts have been willing to apply primary jurisdiction to stay (or even dismiss) RCRA suits to allow these types of administrative activities to run their course.

8. If plaintiff has alleged an endangerment to health or the environment, is it imminent?

To prevail on the merits of a RCRA citizen suit, a plaintiff must establish that an endangerment to human health or the environment is "imminent." The Supreme Court has ruled that "[a]n endangerment can only be 'imminent' if it 'threatens to occur immediately,' and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger." Imminence may be absent where the endangerment is premised on speculative development plans or contingencies, where there is no exposure pathway (*e.g.*, a claim of endangerment to human health based on alleged groundwater contamination, where groundwater is not used for drinking), or remediation has occurred, and to the extent waste remains, it no longer poses a risk. Imminence can be found lacking in these types of fact patterns, notwithstanding the presence of contamination.

9. If plaintiff has alleged an endangerment, is it substantial?

If a plaintiff cannot show that an alleged endangerment is imminent, it follows that it that RCRA's substantiality requirement will not likely be met. Risk assessments may also be very useful in showing the absence of a substantial risk, and defendants should evaluate the relative risks and benefits of performing such an assessment. For example, in a recent case alleging vapor intrusion, a risk assessment showed that the alleged vapor levels were many magnitudes below risk thresholds, and even below the risk presented by the same contaminants present in ambient (outdoor) air.

10. Can you recover your attorneys' fees?

Although the majority of fee awards under RCRA are for plaintiffs, fee awards have been granted to defendants, especially where the suit was frivolous, unreasonable, or groundless, or where the plaintiff continued to litigate after it clearly became so. Don't overlook other bases for fees as well. If there is a contractual relationship with the plaintiff (for example, as is common between successive property owners), all contracts should be reviewed for any applicable fee shifting provisions.

In conclusion, if sued under RCRA's citizen suit provision, consider whether these common defenses or fact patterns apply. Defenses based on notice, standing, or governmental action can provide an early and cost-effective dismissal of the case. Facts showing, for example, speculative alleged endangerment or lack of an exposure pathway should be explored fully in discovery, as they can provide effective defenses on the merits.

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