Updates
November 07, 2017

# Ninth Circuit Paves Way for Regulation of Stormwater Discharges Under RCRA

The Ninth Circuit recently ruled that the Resource Conservation and Recovery Act's (RCRA) anti-duplication provisions under 42 USC § 6905 do not apply in the absence of a stormwater discharge permit issued under the Clean Water Act. Therefore, unregulated stormwater discharges are potentially subject to RCRA citizen suits and specifically imminent and substantial endangerment suits under 42 USC § 6972(A)(1)(B).

**Legal Background**

Discharges regulated under the Clean Water Act are typically not also subject to regulation under RCRA. RCRA's anti-duplication provision states in pertinent part:

Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], . . . except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.

42 USC § 6905(a).

RCRA's integration clause further states:

The Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of. . ., the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], . . . and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection.

42 USC § 6905(b).

Moreover, under RCRA, the term "solid waste" expressly excludes "solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under [the Clean Water Act] . . . ."

The Ninth Circuit's decision in *Ecological Rights Foundation v. Pacific Gas Electric Company*, No 15-15424 (9th Cir. November 2, 2017) potentially alters this general understanding of the intersection between the Clean Water Act and RCRA.

Factual Background

Pacific Gas & Electric Company (PG&E) operates a number of yards and service centers for maintenance of its utility distribution system. PG&E stores and handles new, used and discarded utility poles at these facilities. The

utility poles are treated with wood preservatives, including pentachlorophenol. These facilities are not required to obtain permits under EPA's regulations for stormwater discharges associated with industrial activities.

The Ecological Rights Foundation claimed that stormwater run-off from these facilities as well as track-out of material on vehicles eventually discharged into San Francisco and Humboldt Bays. The Ecological Rights Foundation asserted citizen suit claims against PG&E under the Clean Water Act for discharging pollutants without a permit and under RCRA for PG&E's alleged contribution to the past or present handling, storage, treatment, transportation or disposal of a solid waste that may present an imminent and substantial endangerment to human health or the environment.

The federal district court granted summary judgment in favor PG&E on both of the plaintiff's claims. The district court found that PG&E was not required to obtain a stormwater discharge permit for its facilities. Therefore, there was no violation of the Clean Water Act. With respect to the RCRA claim, the court found that because stormwater discharges are subject to regulation under the Clean Water Act, RCRA's anti-duplication provision prevented the plaintiff from using RCRA to impose additional regulatory requirements, even though PG&E was not required to obtain a stormwater discharge permit. The plaintiff appealed on the RCRA claim, and EPA filed an amicus brief in support of the plaintiff's interpretation of RCRA's anti-duplication provision.

The U.S. Court of Appeals for the Ninth Circuit held that RCRA's "anti-duplication provision does not bar RCRA's application unless that application contradicts a specific mandate imposed under the Clean Water Act." The court ruled that because the Clean Water Act and EPA's regulations did not require PG&E to obtain a permit, there was no inconsistency with RCRA, and therefore RCRA's anti-duplication provisions were not triggered.

The Ninth Circuit was not persuaded by PG&E's argument that EPA's decision not to regulate stormwater discharges like PG&E's was a "rule of law" under the Clean Water Act that barred the RCRA claims. The court also was not persuaded by PG&E's argument that its stormwater discharges were subject to Clean Water Act requirements via municipal storm sewer systems permits held by the local governmental agencies. There was evidence in the record that stormwater discharges from one of PG&E's facilities discharged directly into the bay.

The court therefore reversed the grant of summary judgment in favor of PG&E and remanded for the district court to consider whether stormwater discharges from PG&E's facilities are "solid wastes" and whether PG&E's actions present an imminent and substantial endangerment to human health or the environment under RCRA.

The Ninth Circuit did, however, rule in PG&E's favor with respect to plaintiff's claim that the alleged track-out of materials on vehicles presented an imminent and substantial endangerment. The court found that there was no evidence that PG&E's trucks actually picked up contaminants on their tires and carried them offsite.

Potential Impact of Decision

The Ninth Circuit's decision, while seemingly limited, could have significant impacts.

Like PG&E's facilities in this case, many retail, commercial and warehouse facilities are not required to obtain coverage under a stormwater permit because they are not within the listed activities that are subject to the industrial stormwater permitting requirements. However, many of these facilities likely discharge some pollutants in their stormwater. While most discharges should not present an imminent and substantial endangerment to human health or the environment, the Ninth Circuit's opinion opens the door to such claims. There is also the possibility that facilities that are subject to the industrial stormwater permitting requirements, but that qualify for a no-exposure certification that relieves them of the obligation to obtain a permit, could potentially be subject to RCRA citizen suits.

The Ninth Circuit's reasoning with respect to unregulated stormwater discharges could also extend to non-point source discharges, which are not regulated under the Clean Water Act. Non-point sources include sheet flow from retail, commercial and industrial facilities as well as run-off from agricultural operations and irrigation return flows. Since such discharges are not regulated under the Clean Water Act, RCRA's anti-duplication would not be triggered.

Non-point source dischargers and unregulated stormwater dischargers should watch how events unfold in the district court on remand and whether the district court finds that the PG&E's stormwater discharges constitute a "solid waste" that may present an imminent and substantial endangerment to human health or the environment.



## Authors


### Jeffrey L. Hunter

Partner
JHunter@perkinscoie.com 503.727.2265


## Explore more in

Environment, Energy & Resources | Energy Infrastructure & Clean Technology | Real Estate & Land Use | Mining | Oil & Gas | Forest Products | Retail & Consumer Products

**Related insights**

Update

### CFPB Finalizes Proposed Open Banking Rule on Personal Financial Data Rights

Update

### FDA Food Import and Export Updates for Industry