

U.S. Supreme Court Limits Private Cost Recovery Actions Under RCRA

by J. Daniel Hull *

Nine years ago, a federal court of appeals judge used the phrase "mind-numbing journey" to describe a walk through the sometimes difficult provisions of the federal Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§6901 - 6992 (1994). See, comments of Judge Starr, writing for the majority, in *American Mining Congress v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987). That perception hasn't changed much.

However, four months ago, in *Meghrig v. KFC Western, Inc.*, 516 U.S. ___, 134 L. Ed. 2d 121, 116 S.Ct. 1251, 1996 WL 117012 (March 19, 1996), a unanimous Supreme Court helped to clarify RCRA's complex scheme by construing RCRA's "citizen suits" provision, 42 U.S.C. §6972(a). *KFC Western* holds that RCRA's §6972(a): (1) does not authorize a private cost recovery action if the waste at issue does not pose an imminent and substantial endangerment to health or to the environment at the time the RCRA suit is filed; and (2) does not permit compensation for past cleanup activities. Although *KFC Western* is disappointing to businesses which seek to recover environmental cleanup costs from other private parties, it is both cogent and faithful to RCRA's goals and language.

"Cradle-to-Grave" Management System

Enacted in 1976, and amended on several occasions, RCRA is arguably the most comprehensive waste statute ever instituted in any country. It has strong relationships to, and overlaps with, a number of other federal and state environmental statutes. It regulates solid waste—both non-hazardous and hazardous. RCRA's most heralded aspect is the establishment of a "cradle-to-grave" system of managing hazardous waste and hazardous waste movement through a system (RCRA Subtitle C) of regulating: (1) generators and transporters of hazardous waste; and (2) owners and operators of treatment, storage and disposal facilities. RCRA also requires corrective action at certain hazardous waste facilities. Further, the statute also has provisions for the development of solid waste management plans and guidelines; prohibitions on open dumping; incentives for recycling, reuse and treatment of hazardous waste; promotion of beneficial solid waste management, resource recovery and conservation systems; and regulation of underground storage tanks. RCRA contains significant provisions for both civil and criminal penalties (both monetary and incarceration) for Subtitle C violations.

RCRA focuses primarily on active and solid waste streams. It affects a wide variety of businesses and industries which annually generate, transport, treat and store several hundred million tons of solid wastes in the United States. By contrast, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund")—enacted four years after RCRA in the wake of much-publicized abandoned waste problems (i.e., Love Canal and Valley of the Drums)—focuses instead on inactive, uncontrolled or abandoned hazardous sites where no visible financially responsible parties are present. In effect, RCRA was established in order to avoid the creation of new "Superfund-type" sites four years before the well-known CERCLA/Superfund was enacted in 1980.

Although the primary enforcer of RCRA is the Environmental Protection Agency (EPA), RCRA, like CERCLA/Superfund, contains a citizen suits provision which Congress envisioned as a key enforcement tool for environmental protection. RCRA §6972 allows "any person" to bring a civil action on his or her behalf against any alleged violator of RCRA (or against the EPA Administrator for failure to perform a non-discretionary duty). Suits under RCRA can also be brought against "any person":

including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.