



Strange But True: Recent EPA and State Actions Show Breadth of Environmental Enforcement

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A trilogy of recent federal and state enforcement actions show just how far agencies will go to enforce environmental regulations. Now may be a good time for a compliance audit.

Dumpster Diving

California is not exactly known for its friendly business climate. Now, it's a little clearer how far the State of California has progressed when it comes to citing companies for environmental violations.

DIRECTV is headquartered in Los Angeles. Recently, the company entered into a consent agreement with the state to pay roughly \$9.5 million for violations of regulations governing transportation and disposal of hazardous waste. The November 2, 2017 settlement requires payment of \$8.9 million in penalties and \$580,000 for in-house corrective measures. The company must perform environmental compliance audits at its locations in the state three times over the next five years, and the agreement imposes penalties for any future violations discovered.

The violations concerned small batteries from TV remotes and aerosol cans from DIRECTV service operations centers that were being disposed in dumpsters sent to municipal landfills. These materials qualified as hazardous waste under California law because, unlike many other states, California does exempt small quantities of such materials from regulation as hazardous waste. DIRECTV employees had not been trained on the regulatory status of those materials, and so disposed of them in dumpsters.

Equally surprising as the size of the penalty is the investigative technique used by California regulators to discover the violations: "dumpster diving." From 2016 to 2017, state investigators climbed into trash dumpsters at 25 DIRECTV locations after hours, and they classified and catalogued all of the various wastes being shipped to municipal landfills. Ultimately the only problematic wastes were small batteries used for TV remotes and used aerosol cans.

After prosecuting DIRECTV, the California Attorney General warned other companies that the State of California will hold businesses "accountable" and said the state is making "strides [to keep the] environment free from toxic pollution."

This case points out that businesses in the service and retail sectors are not exempt from environmental regulations and need to be prepared for zealous environmental enforcement.

RMPs Can Change the Way You Operate

A Rhode Island company decided to change the way it does business rather than fight EPA. The case concerned a small plant in Rhode Island that uses ferric chloride in a photochemical etching process to manufacture ornaments and collectibles. Until recently, chlorine was piped to the etching process from four 2,000 pound cylinders.

Chlorine is considered an Extremely Hazardous Substance (EHS) by EPA and listed as a regulated substance (threshold planning quantity of 2,500 lbs.) under § 112(r) of the Clean Air Act (CAA). Facilities storing an EHS on-site in excess of its threshold planning quantity (TPQ) must file annual reports, and § 112(r) of the CAA requires preparation of a risk management plan (RMP).

As a result of a January 2015 inspection, the company was cited for deficiencies in its RMP and failure to report that it was storing chlorine on-site. Under a settlement with EPA in November 2017, the company agreed to pay penalties and to change the way it does business to avoid future penalties and reporting obligations. The changes it made included replacing three of the 2,000 lbs. liquefied chlorine gas cylinders with three 150 lbs. tanks, and upgrading the facility alarm, manifold, and vacuum systems to reduce risks of a release of chlorine.

The news was not all bad. Changes to the company's piping and tank system reduced the amount of chlorine stored to below reporting and RMP compliance thresholds. That said, though, the company will have to receive many more shipments of chlorine gas to meet its existing production needs, meaning the prospect of accidents and releases of chlorine during transportation will increase.

Ignorance of the Law is No Defense

Few federal phrases are more confusing, and hold such great consequence, as "Waters of the United States" (WOTUS). The discharge of pollutants to wetlands and other WOTUS without a permit can result in criminal prosecution, yet the last time EPA attempted to define WOTUS, it resulted in national litigation which is still ongoing. Therefore, knowing what is and is not WOTUS is critical for any development or industrial project, such as mining.

The United States Court of Appeals for the Ninth Circuit recently upheld the criminal conviction of a small miner for discharging dredge and fill materials into WOTUS without a permit. The miner's defense was not complicated: he argued that, given all the litigation and rulemaking over WOTUS, he did not have "fair notice" of the government's interpretation of the term and therefore could not "knowingly" violate the statute.

The evidence showed that Mr. Robertson, the miner, excavated pits and placed spoils into wetlands. The wetlands bordered a non-navigable tributary to Cataract Creek, which flows to the Boulder River in Montana. While the Boulder River is quite shallow and also cannot be navigated, it drains to the Jefferson River which is navigable. The United States indicted Mr. Robertson for not obtaining a permit to fill the wetlands, claiming the wetlands are non-navigable WOTUS that affect interstate commerce in the Jefferson River some 20 miles away. It alleged the wetlands had a "significant nexus" to the Jefferson River.

The Ninth Circuit rejected Mr. Robertson's defense and said he "was on notice... at the time of his excavation activities... that wetlands and non-navigable tributaries are subject to CWA jurisdiction" where there is a significant nexus to a navigable stream. The Court then took 14 pages to explain the meaning of WOTUS, tracing the term's legal history from the U.S. Supreme Court's 2006 decision in *Rapanos*. (The *Rapanos* case is a confusing "plurality decision" where less than a majority of Supreme Court Justices agreed upon an interpretation of WOTUS.) After admitting "[a]ll this paints a rather

complex picture and one where without more it might not be fair to expect a layman of normal intelligence to discern... [the scope of WOTUS],” the Ninth Circuit nonetheless upheld Mr. Robertson’s conviction.

The *Robertson* case is important because it shows that ignorance of even a “complex” law is no defense to violations. Accordingly, it is important that environmental compliance audits and site assessments include a legal analysis. A legal analysis of WOTUS may have helped this miner avoid jail; on the other hand, given the current confusion over WOTUS, maybe not.

***California v. DIRECTV*, Civ. Action No. R617880964 (Sup. Ct. CA, Nov. 2, 2017).**

***Administrative Order on Consent with ChemArt Company*(EPA Aug. 2017)**

***United States vs. Joseph David Robertson*, No. 16-30178 (9th Cir. Nov. 27, 2017).**

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