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Vacaville And RCRA Update

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The U.S. Court of Appeals for the Ninth Circuit reversed its prior decision in a case involving liability under the Resource Conservation and Recovery Act (RCRA) by the city of Vacaville, California, for transporting and discarding hexavalent chromium while providing drinking water to residents. It appeared to be a novel expansion of RCRA liability to the act of supplying drinking water that met all applicable drinking water standards.

The original case was *California River Watch v. City of Vacaville* (14 F.4th 1076 9th Cir. 2021), (*Vacaville I*) and, on July 1, the same Ninth Circuit panel that rendered the initial decision withdrew the prior majority and dissents opinions and decided to uphold the District Court's grant of a summary judgment to the City of Vacaville. Thus, *California River Watch v City of Vacaville*, __ F.4th __ (9th Cir. 2022) (Case No. 20-16695), (*Vacaville II*), rendered the petition for a rehearing en banc as moot. The judge who dissented in the prior decision of the panel filed a separate opinion concurring only on the result.

Vacaville I reversed the District Court's summary judgement grant to the city of Vacaville dismissing California River Watch's case. Initially, the Ninth Circuit ruled that the city could be liable under RCRA's citizen suit provision for transporting and discarding hexavalent chromium in drinking water. This was even though the drinking water met both the federal and more stringent California drinking water standard for total chromium (neither drinking water standard has a separate standard for hexavalent chromium). California River Watch alleged the city was liable under RCRA for the distribution of drinking water from a groundwater well that may have had chromium present due to the disposal of chromium wood treating chemicals. *Vacaville I* found it to be a triable issue as to whether the provision of drinking water with a chemical contaminant could be the transportation of a solid waste under RCRA.

Upon reconsideration, the panel focused on one of the issues the city raised,

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which was whether the provision of chromium containing drinking water constituted “transportation” under RCRA. The panel first considered the dictionary definition of “transportation” but then decided to evaluate how the term “transportation” was addressed in RCRA. In *Vacaville* I, the court did not look as deeply at the meaning of “transportation.” The majority in a footnote in *Vacaville II* quoted from Justice Robert H. Jackson’s dissent in a 1948 U.S. Supreme Court case, *Massachusetts v. United States*, that the court did not have to be “consciously wrong today, because [we were] unconsciously wrong yesterday.”

The majority concluded that when considering the meaning of “transportation” in the whole scheme of RCRA, delivery of water was not connected to the waste disposal process that is subject to RCRA liability. The majority did think whether the chromium was a waste was a triable fact.

The majority also referenced *Hinds Invs., L.P, v. Angioli*, but disagreed with the concurring opinion that the *Hinds* case was controlling. The concurring opinion expressed the view that *Hinds* requires the defendant to be actively involved in or have some degree of control over the waste disposal process, in order to be liable under RCRA. Since it was conceded that the city had no involvement or control over the presence of the hexavalent chromium in the drinking water then there could be no RCRA liability.