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Monday, March 28, 2005

Activists Fear Waste Suit Loss Could Limit Ability To Challenge State Permits

A federal judge's rejection of a citizen suit seeking to shut down an Army chemical weapons incinerator in Anniston, AL, could undermine plaintiff's ability to file suit in federal court under Resource Conservation & Recovery Act (RCRA) targeting state permit actions, according to sources involved in the suit.

An attorney for the plaintiffs is recommending the groups appeal [the ruling](#) to the U.S. Court of Appeals for the 11th Circuit. But an environmentalist says the groups have not yet decided whether to mount an appeal.

A federal district court in Alabama on March 18 dismissed a suit filed by 12 citizen, environmental and veterans groups seeking an injunction halting operations at the Anniston Chemical Agent Disposal Facility (ANCDF), which the Army began operating in 2003 to destroy chemical munitions stockpiled at a nearby depot. These include VX nerve agents, mustard munitions and explosive components, according to Army sources.

The groups alleged that the Army had violated RCRA permit regulations requiring the Army to inspect the facility regularly and to design the facility in a manner that minimizes the danger of a hazardous waste release. They also accused the Army of failing to properly analyze the waste, citing evidence that the incinerator was emitting mercury and other hazardous materials into the environment.

But District Judge R. David Proctor ruled in *Families Concerned About Nerve Gas Incineration, et al, v. United States Department of the Army, et al.* that the suit constituted an improper challenge to the state's permit to operate the facility.

"The undisputed evidence indicates that no violations have occurred and that . . . their claims have no merit," he said. The case was "nothing more than a thinly veiled effort to collaterally challenge" the Army's permit, meaning the plaintiffs were improperly trying to use a federal court to attack a state permitting decision that had already been affirmed by Alabama state courts.

Proctor found that the Army's ANCDF incineration program was in full compliance with its permit and dismissed the evidence of mercury emissions as "without factual basis."

The ruling rested on two foundations. First, that a federal court lacks the jurisdiction to consider "collateral" challenges to a state permit. Because EPA had delegated its RCRA enforcement authorities to the Alabama Department of Environmental Management (ADEM) in 1987, compliance with a state-issued permit is tantamount to compliance with RCRA, Proctor wrote.

"The essence of the plaintiffs' claims in this case is that, even if ANCDF were operated in full compliance with the permit conditions . . . defendants would still be in violation of the regulations," he wrote. And since Alabama state courts had already affirmed the permitting decision, "this court cannot -- and will not -- second-guess ADEM's chosen application of the Alabama regulations to ANCDF's permit."

Proctor's second pillar was *res judicata* -- the legal doctrine that prohibits re-litigation of matters that have been or could have been litigated earlier. He found that all of the plaintiffs' claims had been or could have been litigated in hearings before state authorities.

Proctor also ordered the plaintiffs -- a coalition including the Chemical Weapons Working Group (CWWG), the Sierra Club and the Vietnam Veterans of America Foundation -- to pay court costs for the three-year lawsuit.

A CWWG source says the ruling could make it more difficult for citizens to bring such lawsuits in the future. RCRA grants citizens the right to sue any party that is violating permits governed by RCRA, or parties whose methods of disposing of solid or hazardous waste may constitute "an imminent or substantial threat to health or the environment."

The ruling effectively reversed a separate ruling by another federal judge in July 2003 allowing the citizen suit to proceed. Citizen sources criticized this reversal. "It seems like the Army had two bites at the apple. Losing the first, they merely argued the very same points using a different legal approach and won," Craig Williams, director of the CWWG, said in a March 21 press release.

Date: March 28, 2005
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