

January 1983

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Recommended Citation

Carol E. Dinkins, *Enforcement of the Statutes Governing Disposal and Cleanup of Hazardous Wastes*, 1 Pace Envtl. L. Rev. 1 (1983)

DOI: <https://doi.org/10.58948/0738-6206.1105>

Available at: <https://digitalcommons.pace.edu/pelr/vol1/iss1/3>

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Enforcement of the Statutes Governing Disposal and Cleanup of Hazardous Wastes

CAROL E. DINKINS*

It is an occasionally overlooked fact that, absent clear statutory directives to the contrary, the Attorney General has full plenary authority over all litigation in which the United States is a party. This authority is not only firmly established in common law and tradition but was specifically conferred by one of Congress's first enactments—the Judiciary Act of 1789.¹

Assigning this authority to the Attorney General centralizes the conduct of litigation on behalf of the United States and thereby furthers a number of important policy goals. Centralized control assures, for example, that the United States brings to the courts only those cases which are appropriate for judicial resolution. Moreover, such control over litigation allows the presentation of uniform, consistent positions on important legal issues and ensures that the United States will be able to select test cases which present the government's position in the best possible light. It provides for greater objectivity in the filing and handling of cases by attorneys who are not themselves affected litigants. And, finally, it facilitates presidential supervision over Executive Branch policies implicated in litigation.

Implicit in the broad grant of litigative authority to the Attorney General is the recognition that the Attorney General must serve the interest of the "client" agency as well as

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1. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789), current version at 28 U.S.C. § 517 (1976).

the broader interests of the United States. While the Attorney General is obligated to enforce the Constitution and the will of Congress as expressed in the public laws, he must also be a strong advocate for the specific legal interests of the client agency.

Fulfilling this obligation is a job that is taken very seriously by the Land and Natural Resources Division. Our client agencies, and the officials who run them, are charged with the formulation and implementation of programs and policy. In representing our client agencies, which include the Environmental Protection Agency (EPA), the Departments of the Interior, Agriculture, and Commerce and the Army Corps of Engineers, our task is to defend their policies against legal challenges and to enforce the law against those who violate it. In performing this responsibility, we have a particular obligation to assure that our positions are well-founded in the law, that they are fair, that our contentions and our strategy will not embarrass or compromise the United States before the federal courts, and above all, that we will promote justice.

One of the Division's very highest priorities involves programs that are critical to protecting the public health and the environment. These programs, which are primarily those of the EPA, include enforcement of the statutes governing the disposal and cleanup of hazardous wastes. The problems which have arisen from the haphazard disposal of chemical wastes might not have occurred had America remained a simpler society. But the vast progress we have experienced in this century, in the development of man-made products which have enhanced our standard of living far beyond the expectation of our grandparents, has also become a serious threat to values which Americans have always cherished: clean water, clean air, and a safe environment.

In response to the inadequately controlled practices involved in the storage, handling, and disposal of hazardous substances, Congress passed the Resource Conservation and Recovery Act (RCRA) in 1976 and amended it in 1980.² RCRA

2. 42 U.S.C. §§ 6901-6987 (1976 & Supp. V 1981).

established an ambitious "cradle-to-grave" regulatory approach to hazardous wastes, making it possible to track the existence and ultimate disposal of toxic wastes. The statute's primary thrust is to establish good management practices which will ensure that the public health, welfare, and the environment are protected from the careless handling and disposal of these chemicals.

Despite its comprehensive nature, RCRA does not adequately address the problems associated with abandoned dump sites, or past practices, which have left a legacy of threatened and actual danger to human health and the environment. Recognizing the dangers presented by these sites, as well as the dangers implicit in future releases of hazardous substances, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980.³ This statute, commonly known as Superfund, creates a \$1.6 billion Hazardous Substance Response Trust Fund which is to be used to pay for abatement of releases or threatened releases of hazardous substances which endanger the public health, welfare, or the environment.

Although RCRA's primary thrust is prospective regulation of existing sites, and Superfund authorizes the expenditure of funds for cleanup of actual and potential environmental problems, both statutes rely on strong enforcement provisions to encourage voluntary compliance and to insure that noncompliance is dealt with swiftly and effectively. Sections 7003 of RCRA⁴ and 106(a) of Superfund⁵ are "imminent hazard" provisions which authorize the government to bring suit in federal district court to seek and obtain such relief as "is necessary" to abate an actual or potential endangerment to health, welfare, or the environment. Section 107 of Superfund allows the government to recoup all money expended in site cleanup from any responsible party, including litigation costs.⁶

3. 42 U.S.C. §§ 9601-9657 (Supp. V 1981).

4. 42 U.S.C. § 6973 (1976 & Supp. V 1981).

5. 42 U.S.C. § 9606(a).

6. 42 U.S.C. § 9607.

These broad grants of authority represent Congress's clear intention that not only harm, but the *risk* of harm, will be actionable, and that to the fullest extent possible the cost of cleanup should be borne by those who were responsible for or contributed to the problem. Although the Superfund and RCRA enforcement efforts have not been in place very long, we have already achieved some significant litigation victories that will have important precedential effect not only on future cases but on the prospect for settlement as well.

For example, in *United States v. Hardage*,⁷ the district court held that section 7003 of RCRA confers strict liability without fault upon any person contributing to the handling, storage, treatment, transportation, or disposal of a solid or hazardous waste where such an activity may present an imminent and substantial endangerment to health or the environment. And, in *United States v. Price*,⁸ the term "contributing to" an imminent and substantial endangerment in the context of section 7003 of RCRA was held to embrace former owners and operators of property on which a hazardous dump site was operated.⁹ The same court further recognized that past activity was clearly within the purview of section 7003.¹⁰ The *Price* court also rejected the current landowners' contention that they had no liability because they were innocent purchasers of property on which the dump site was located and no dumping had occurred after their purchase of the property.¹¹ The court focused on the present landowners' responsibility arising out of their knowledge of the past use of the site and existence of the dump site on the property when they purchased it.¹² This concept has also been held to be applicable to responsible corporate officers who contributed to the creation of an imminent hazard.¹³

7. No. 80 Civ. 1031-W (W.D. Okla. Sept. 29, 1982).

8. 523 F. Supp. 1055 (D. N.J. 1981).

9. *Id.* at 1072-73.

10. *Id.* at 1071.

11. *Id.* at 1073-74.

12. *Id.* at 1073.

13. *United States v. Northeastern Pharmaceutical Chem. Co.*, Civ. No. 8-5066-CV-SW (W.D. Mo. July 11, 1981).

Price was appealed to the Third Circuit on other grounds and, in a recent decision,¹⁴ the court made clear that injunctive relief which requires monetary payments, such as funding a diagnostic study, may well be an appropriate form of preliminary remedy.¹⁵ The court also observed that the emergency abatement provisions of RCRA and Superfund actually strengthen the power of the courts to order equitable remedies. With respect to RCRA, the court emphasized that there was "no doubt" that section 7003 "authorizes the cleanup of a site, even a dormant one, if that action is necessary to abate a present threat to the public health or the environment."¹⁶ The court went on to state that "if a threat to human health can be averted only by providing individuals with an alternate water supply, that remedy, in an appropriate case, may be granted under the authority of section 7003."¹⁷ This portion of the Third Circuit's opinion in *Price*, although technically *dicta*, significantly undercuts the precedential value of the now famous decision in *United States v. Wade*,¹⁸ which was handed down just a week earlier. In *Wade*, the district court held, among other things, that "section 7003 may not . . . be used to confer liability on non-negligent past off-site generators of hazardous waste."¹⁹ In our view, the court's holding was founded on a narrow and highly selective reading of the relevant legislative history. And for this reason we are appealing the holding in *Wade*.

With respect to the emergency abatement provision of Superfund, the court in *United States v. Reilly Tar & Chemical Corp.*²⁰ ruled that "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."²¹ Consequently, Superfund "should

14. 688 F.2d 204 (3d Cir. 1982).

15. *Id.* at 211-13.

16. *Id.* at 214.

17. *Id.*

18. 546 F. Supp. 785 (E.D. Pa. 1982).

19. *Id.* at 790.

20. 546 F. Supp. 1100 (D. Minn. 1982).

21. *Id.* at 1112.

not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for clean-up costs."²²

The victories and opinions in *Price, Hardage, Reilly Tar, Northeastern Pharmaceutical*, and several other cases, have given litigators in the Division's Environmental Enforcement Section what Mark Twain once called "the calm, cool confidence of a Christian with four aces."²³ These cases, which represent only a fraction of our litigation effort in this area, exemplify this Administration's commitment to law enforcement. In our view, failure to comply with obligations established by environmental statutes should be treated as serious law enforcement matters deserving of the same attention and prosecution as violations of the tax, securities, anti-trust or other laws.

The President, in announcing the Administration's Anti-Crime Initiative, made the point that we often draw distinctions between violent crime and sophisticated crime, or between crimes like drug-pushing and crimes like bribery. But the truth is that crimes do not come in categories—they are part of a pattern. If one sector prospers in the community of crime, so ultimately do the others.

Implicit in the President's remarks is the awareness that non-enforcement of some laws breeds disrespect for all laws. This is equally true for civil as well as criminal enforcement because only through active prosecution of violators can voluntary compliance with the law be encouraged. And I do not believe it is naive to expect that solid support for an even-handed and consistent enforcement effort should come from industry itself. After all, failure to enforce Superfund, RCRA, and the other environmental statutes confers a distinct competitive advantage on the violator and, in effect, punishes the law-abiding members of the business community.

Working from the well-founded premise that an active enforcement effort encourages voluntary compliance with the law, we have consistently maintained a willingness to negoti-

22. *Id.*

23. J. Bartlett (ed.), *Familiar Quotations* 680 (13th ed. 1955) (attributed).

ate settlements that serve the public interest. In fact, we only file suit after giving prospective defendants an opportunity to meet with us face-to-face and to discuss the terms for a voluntary resolution of their liability. While we favor negotiated settlements, we cannot conclude that a negotiated settlement of disputes is a "more viable alternative" to litigation. That is because settlement and litigation work in tandem. To encourage settlement and discourage those who refuse to negotiate with the government, it is our policy in multiparty hazardous waste cases to proceed to sue nonsettling parties for all remaining relief to demonstrate a disincentive to those who refuse to agree to a negotiated resolution of our claims.

Three recent hazardous waste cases—*United States v. Wade*,²⁴ *United States v. South Carolina Recycling and Disposal, Inc.*,²⁵ and *United States v. Chem-Dyne*²⁶—demonstrate the seriousness with which we undertake this approach. In *United States v. Wade*, we obtained \$1.7 million from thirty-one settling generators of hazardous waste and then amended our pending suit to add claims for injunctive relief under both RCRA and Superfund against the nonsettling generators.²⁷ In *United States v. South Carolina Recycling & Disposal, Inc.*, we agreed to cash payments from companies for their share of surface cleanup and gave them a release which reserved the government's right to proceed against them, and any other responsible party, for groundwater and other contamination at the site. We then sought leave to amend our existing complaint to add nonsettling parties to the suit.²⁸ In *United States v. Chem-Dyne*, EPA notified more than 280 private companies that they were potentially responsible for cleanup of the hazardous waste site in Hamilton, Ohio. We then identified twenty-nine companies who contributed more than eighty percent of the material at the site and focused negotia-

24. 546 F. Supp. 785.

25. Civ. No. 80-1274-6 (D. S.C. July 7, 1980).

26. Civ. No. C-1-82-840 (S.D. Ohio Aug. 26, 1982).

27. 546 F. Supp. at 787.

28. Amended Complaint, *United States v. South Carolina Recycling & Disposal, Inc.*, Civ. No. 80-1274-6 (D. S.C. July 23, 1982).

tions on these companies. After a period of intense negotiations, we accepted settlement offers totaling approximately \$2.42 million from companies who contributed seventy percent of the volume of wastes at the site. Settling parties were released only as to surface liability and as to the performance of a groundwater study. We reserved our rights with respect to future litigation concerning groundwater contamination. Immediately upon execution of an agreement with more than one hundred parties, the United States filed a lawsuit against the major nonsettling parties.²⁹

Parties should understand that in allowing companies to settle by "cashing out," as in *Chem-Dyne*, the government must assume the risk of assuring that enough money exists to effect cleanup and, therefore, more than a simple "fair share" payment will be expected in settlement. This is a sensible approach since costs will almost certainly increase after a party cashes out. Moreover, at most sites not all responsible parties will be solvent: thus, a purely volumetrically based fractional settlement may never be completely possible.

We will generally negotiate and accept settlements which take these uncertainties into account, protect the Fund, and assure that cleanup will occur. In evaluating settlement offers, credit is not given for past cleanup activity at a site; only future expenditures and undertakings will form the basis of the relief sought by the government. While laudable, past voluntary activity simply cannot form the basis for settlement of future liabilities. The reason for this is quite simple: to the extent that a credit diminishes liability, Superfund would have to make up the difference and this could exhaust the funds needed to clean up sites where solvent financial parties are unavailable.

In cases which the government has settled, we have provided an adequate release from liability. We have taken a flexible approach, including joint and several liability and cashing out. But it should not be forgotten that our willingness to negotiate is matched by a willingness to let the court

29. Civ. No. C-1-82-840.

decide who is liable and for how much. I think it is fair to say that parties involved with hazardous waste lawsuits now respect the government as a firm, fair negotiator and litigator; we are not considered a paper tiger.

The Justice Department and the EPA have placed increased emphasis on criminal prosecutions. EPA is staffing its field offices with trained criminal investigators. The FBI has agreed to investigate up to thirty hazardous waste cases per year, and we have created a criminal unit within the Environmental Enforcement Section of experienced criminal prosecutors to work with the EPA and the United States Attorneys in the development and prosecution of our cases. This approach has been very successful. During the last year, in each case in which an individual has been convicted of violating an environmental statute, courts have imposed jail sentences of up to two years.

I believe it is accurate to say that the criminal enforcement program within the Lands Division is now mature and experienced. We know how to try complex cases and get convictions and we know how to sustain those convictions on appeal. Of course, these convictions are not really won in court by lawyers, they are won by the investigators who collect evidence—evidence identifying the chemicals dumped at hazardous waste sites and individuals who dumped them; evidence of contamination of groundwater; and evidence concerning the involvement of organized crime.

While a high degree of specialized technical expertise is necessary for these investigations, I believe fundamental investigative techniques and sound investigative instincts are equally important. The Federal Bureau of Investigation has committed the resources necessary to conduct, over the next year, thirty full-scale investigations into illegal hazardous waste disposal. In addition, EPA has recently hired twenty-one experienced criminal investigators to staff its five newly created area offices in Atlanta, Chicago, Denver, Philadelphia, and Seattle. Procedures have been implemented nationally for the investigation and referral of criminal cases from EPA to Justice. The result is that the caseload of crimi-

nal actions is expected to double from the already increased caseload that presently exists.

Let there be no misunderstanding: for those who endanger the public's health by poisoning our land and water, it is not going to be business as usual any longer. In cooperation with state and local law enforcement agencies, the full force of federal enforcement will be brought to bear on these illegal acts.

I want to emphasize that the Department's policy in criminal cases is to explore thoroughly the liability of individuals rather than merely accepting pleas and fines from corporations. The Department of Justice does not view violation of pollution laws as simply the acts of business organizations. It is self-evident that the work of corporations is carried out by individuals. Any employee, officer, or corporate director who violates these laws is potentially a target of a criminal investigation. Moreover, attempting to remain ignorant of criminal activity does not provide an individual with a defense. Under RCRA, evidence that a party affirmatively attempted to avoid knowledge of illegal activity is circumstantial evidence of the necessary knowledge to support conviction under the statute.³⁰

RCRA carries felony sanctions for "knowing" violations which can result in jail sentences of up to two years and fines up to \$50,000.³¹ In addition, the "knowing endangerment" provision of RCRA subjects individual defendants to fines of up to \$250,000 and five years in prison.³² A corporation that is convicted of violating this provision faces a \$1 million fine.³³ The notification and recordkeeping provisions of both RCRA and Superfund also provide criminal penalties.³⁴

Let me close my remarks by telling you that I have only scratched the surface of the existing and potential legal and policy issues in the enforcement of RCRA and Superfund. I

30. 42 U.S.C. § 6928(f) (Supp. V 1981).

31. 42 U.S.C. § 6928(d) (1976 & Supp. V 1981).

32. 42 U.S.C. § 6928(e) (Supp. V 1981).

33. *Id.*

34. 42 U.S.C. § 6928(d), (e); 42 U.S.C. § 9603(b),(d).

believe that as the EPA's program of site cleanup progresses, and additional litigation is generated, we will be taxed to the limit of our abilities to be innovative and creative in resolving these issues. But our determination to enforce the law to the best of our ability will not falter.