

# 1 RCRA Enforcement Issues

## **Government Enforcement:**

- Administrative
- Civil
- Criminal

## **Citizen Suits:**

- Elements of an action
- Remedies
- “Organizational” standing

## 2 Government Enforcement Tools

- Facility inspections, sampling and record review  
RCRA § 3007 (42 U.S.C. § 6927)
- Where a release “may present a substantial hazard to human health or the environment,” orders requiring owner/operator to monitor, test and analyze  
RCRA § 3013 (42 U.S.C. § 6934)
- Where EPA finds a violation of a “subtitle C requirement,” an (i) order assessing a penalty for any past or current violation, requiring compliance or (ii) a civil action  
RCRA § 3008(a) (42 U.S.C. § 6928(a))

### **3 Raising the Stakes**

**RCRA § 3008(a) (42 U.S.C. § 6928(a))**

“Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.”

## 4 Government Enforcement Tools

- When there is a release or threat of a release from an “interim status” facility, an order requiring corrective action or other response measures necessary to protect human health or the environment the violation of which triggers penalties

RCRA § 3008(h) (42 U.S.C. § 6928(h))

- For violations of orders re “interim status” facilities, penalties or an action for “relief,” including a temporary or permanent order to stop the activity

RCRA § 3008(h) (42 U.S.C. § 6928(h))

## 5 Government Enforcement Tools

- The EPA can take enforcement action against the owner/operator when there is evidence that past or present handling, storage, treatment, and/or transportation of any solid waste or hazardous waste **may** present an **imminent** and **substantial endangerment** to health or the environment. If a person willfully violates, or fails or refuses to comply with an order, the Agency can seek penalties for each day the violation occurs or the failure to comply continues.

RCRA § 3008(h) (42 U.S.C. § 6928(h))

# 6 Criminal Enforcement

RCRA § 3008(e) (42 U.S.C. § 6928(e))

- A fine of up to \$50,000 for each day of violation
- Imprisonment of up to five years for causing hazardous waste to be stored in an unpermitted facility or treating, storing or disposing of hazardous waste in violation of a RCRA requirement
- Imprisonment of up to two years for any other RCRA violation (such as omitting material information on an application)
- The fines and period of possible imprisonment are doubled for a second conviction

# 7 Criminal Enforcement

RCRA § 3008(e) (42 U.S.C. § 6928(e))

“Any person who **knowingly** transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.”

# 8 Criminal Enforcement

## RCRA § 3008(e) (42 U.S.C. § 6928(f))

“For the purposes of subsection (e)—

(1) A person’s state of mind is knowing with respect to—

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant’s possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.”

# 9 RCRA Criminal Prosecutions

<b>Year:</b>	<b>State Prosecutions:</b>	<b>Federal Prosecutions:</b>
<b>2016</b>	<b>9</b>	<b>0</b>
<b>2017</b>	<b>6</b>	<b>0</b>
<b>2018</b>	<b>15</b>	<b>0</b>
<b>2019</b>	<b>14</b>	<b>0</b>
<b>2020</b>	<b>15</b>	<b>0</b>
<b>2021</b>	<b>2</b>	<b>0</b>
<b>2022</b>	<b>13</b>	<b>1</b>
<b>2023</b>	<b>8</b>	<b>0</b>

# 10 RCRA § 7002

42 U.S.C. § 6972

” . . . **Any person** may commence a civil action on his own behalf --

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be **in violation** of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal, 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 . . .”

# 11 RCRA § 7002 as Interpreted

- The use of the word “**may**” is “intended to make the provision expansive.”
- “**Imminent**” and “**substantial**” are distinct requirements.
- “The combination of the word “**may**” with the word “**endanger**,” both of which are probabilistic, leads us to conclude that a reasonable prospect of future harm is adequate to engage the gears of RCRA § 7002(a)1)(B) so long as the threat is near-term and involved serious **harm**.” *Maine People’s Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277 (1<sup>st</sup> Cir. 2006)
- “**Substantial**” implies “serious **harm**.”

## **12 Elements of a RCRA § B Claim**

1. The defendant (i) generated or transported solid or hazardous waste, or (ii) is an owner or operator of a treatment, storage or disposal facility.
2. The defendant did, or failed to do, something that has created a problem.
3. That problem has created the reasonable prospect of a threat of harm sometime fairly soon.
4. The manifestation of that threat need not be immediate. But when it does manifest itself, the harm must be of a serious nature.

# 13 RCRA Citizen Suit Remedies

RCRA § 7002(a)(1)(B) (42 U.S.C. § 6972 (a)(1)(B))

“The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both . . . and to apply any appropriate civil penalties . . .”

# 14 RCRA Citizen Suit Remedies

RCRA § 7002(e) (42 U.S.C. § 6972(e))

“The court, in issuing any final order in any action brought pursuant to this section . . . **may** award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, **whenever the court determines such an award is appropriate**. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.”

## 15 RCRA Remedies

- Injunctive relief, including orders requiring the defendant to pay, but not necessarily perform, investigation and remediation
- Traditional damages awards are not awardable
- Prevailing party recovers costs and reasonable attorneys' fees. (42 U.S.C. § 6972(e).) **But is that really true?**

## **16 Organizational Standing Requirements**

1. Individual members of the organization would have Article III standing (injury-in-fact, causation and redressability) to sue in their own right
2. The interests at stake in the RCRA action are related to the organization's core purposes
3. Both the substantive RCRA claim and the requested relief can be litigated without the member's involvement