Harping on Harmonics:  
Strategy and Advocacy in *Center for Community Action & Environmental Justice v. BNSF Railway*

**INTRODUCTION**

On August 20, 2014, the Ninth Circuit held in *Center for Community Action & Environmental Justice v. BNSF Railway Company (CCAEJ)* that the Resource Conservation and Recovery Act (RCRA) does not regulate diesel particulate matter (DPM) emissions from railyards.1 The plaintiffs2 presented a unique argument—RCRA should be harmonized with the Clean Air Act to expand its scope to cover railyards’ DPM emissions.3 The court ultimately rejected this claim because the statutory language of RCRA and the Clean Air Act show a clear decision by legislators to leave railyards unregulated at the federal level.4 However, this In Brief argues that by bringing attention to the regulatory gap, the CCAEJ plaintiffs can use the decision as part of a broader advocacy campaign to fight for a healthier environment.

**I. BACKGROUND**

**A. Diesel Particulate Matter**

Diesel engines provide power to heavy machinery in many industries, including transportation, agriculture, and manufacturing.5 DPM is produced during the engines’ combustion of diesel fuel and emitted through exhaust.6 Exposure to DPM carries the “risk of health effects ranging from irritation of the eyes and nose, headaches and nausea, to respiratory disease and lung cancer.”7

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2. The plaintiffs were the Center for Community Action and Environmental Justice, East Yard Communities for Environmental Justice, and the Natural Resources Defense Council.
4. Id. at 1029–30.
6. Id.
7. Id.
The defendants\(^8\) in *CCAЕJ* owned and operated railyards where locomotive, truck, and other heavy-duty vehicle engines emitted over 160 tons of DPM in a one-year period.\(^9\) The plaintiffs claimed that wind and air currents transported DPM from defendants’ railyards onto nearby land and water, where people inhaled DPM “both directly and after the particles [had] fallen to the earth.”\(^10\)

**B. Resource Conservation and Recovery Act**

Enacted in 1976, RCRA regulates solid and hazardous waste management.\(^11\) The statute seeks “solv[e] the problems associated with the 3-4 billion tons of discarded materials generated each year.”\(^12\) RCRA’s objectives include protecting human and environmental health, conserving energy and natural resources, and generating less waste.\(^13\) To achieve these objectives, legislators included a citizen suit provision which provides that “any person may commence a civil action” against the “owner or operator of a treatment, storage, or disposal facility” if the owner or operator contributed to the disposal of hazardous waste which “may present an imminent and substantial endangerment to health or the environment.”\(^14\) The suit in *CCAЕJ* is an example of this kind of RCRA citizen suit.\(^15\)

*CCAЕJ* also addressed a 1984 RCRA amendment requiring the Environmental Protection Agency to “promulgate . . . regulations for the monitoring and control of air emissions at hazardous waste treatment, storage, and disposal facilities.”\(^16\) Previously, RCRA’s scope had been limited to the regulation of “land disposal.”\(^17\) The 1984 amendment extended it to cover limited types of “air emissions,” creating an overlap between RCRA and the Clean Air Act.\(^18\)

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8. The defendants were BNSF Railway Company and Union Pacific Railroad Company.
9. 764 F.3d at 1021.
10. Appellants’ Opening Brief at 3, *CCAЕJ*, 764 F.3d 1019 (9th Cir. 2014) (No. 12-56086).
18. § 201(n), 98 Stat. at 3233.
C. Clean Air Act

The 1970 Clean Air Act was the first comprehensive federal legislation regulating air pollution.\(^{19}\) In 1977, the year after RCRA’s enactment, Congress significantly overhauled the scope and reach of the Clean Air Act.\(^{20}\) These amendments were intended to provide additional legislative guidance on issues that went unaddressed in prior versions of the Act.\(^{21}\) Particularly important in CCAEJ is a provision that established the “indirect source review program.”\(^{22}\) Regulation of an indirect source is analogous to “putting a permeable bubble over an area of land and then regulating the emissions that come out of the bubble, regardless of source.”\(^{23}\) The provision prohibits direct federal regulation of “indirect sources,” but its terms expressly permit states to regulate indirect sources through their Clean Air Act implementation plans.\(^{24}\) Indirect sources include any “facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution.”\(^{25}\) At the time of the plaintiffs’ complaint, the California Air Resources Board did not regulate railyards as indirect sources despite having the power to do so under the indirect source provision.\(^{26}\)

II. CASE SUMMARY

A. Harmonization of the Clean Air Act and RCRA

It is clear from the statutory and legislative histories that the Clean Air Act primarily governs air pollutants, while RCRA mostly concerns land disposal.\(^{27}\) However, the Clean Air Act does not provide for federal regulation of all sources of air pollution. In addition, RCRA does not entirely exclude regulation of air emissions. This is evidenced by the 1984 amendments, which expanded RCRA to regulate air emissions at “hazardous waste treatment, storage, and disposal facilities”\(^{28}\) and created the only regulatory overlap between RCRA and the Clean Air Act.\(^{29}\)
The plaintiffs contended this overlap demonstrated that RCRA and Clean Air Act jurisdiction are not mutually exclusive, and RCRA should be used to fill in the gaps in the Clean Air Act’s coverage. This “harmonization” process occurs when multiple federal statutes apply to a single case—harmonizing two statutes gives effect to both. The plaintiffs cited courts’ previous harmonization of RCRA with other environmental statutes as evidence that RCRA and the Clean Air Act should be harmonized to create RCRA regulation of air emissions from railyards.

The plaintiffs further argued for harmonization of the two statutes by pointing to the laws’ divergent purposes: RCRA primarily focuses on “immediate relief from hazardous substances” whereas the Clean Air Act promotes the attainment of “national and regional air standards over time.” Thus, plaintiffs contended, since the two statutes have different scopes and goals, they would not be inconsistent if applied together. Harmonization of the Clean Air Act and RCRA would allow the plaintiffs to take steps to secure a healthier environment.

B. Ninth Circuit Treatment of Proposed Harmonization

The Ninth Circuit rejected the plaintiffs’ argument for harmonization of RCRA and the Clean Air Act. Instead, the court held that any gap in regulation of railyard DPM emissions was “the product of a careful and reasoned decision made by Congress.” To reach this conclusion, the court examined the statutory language and legislative histories of the two statutes.

The court explained that the legislative history resolved ambiguities in the statutory text in two ways. First, the history supported the generalization that RCRA is intended to govern “waste disposal” whereas the Clean Air Act governs “air pollutants.” Consequently, railyard emissions must constitute “waste disposal” in order to fall under RCRA. However, through a careful analysis of the text’s language the court determined that “‘disposal’ does not

31. Id. at 17 (citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976)).
33. Appellants’ Opening Brief, supra note 10, at 20.
34. See id. at 19–20.
36. Id. at 1030.
37. Id. at 1029.
38. Id.
39. Id.
40. Id. at 1023.
extend to emissions of solid waste directly into the air.”\textsuperscript{41} This finding supported the court’s conclusion that RCRA is concerned with disposal of waste onto land or into water, whereas the Clean Air Act governs emissions into the air.\textsuperscript{42}

Second, the court relied on legislative history to show that the only overlap between RCRA and the Clean Air Act never applied to emissions from railyards.\textsuperscript{43} The 1984 RCRA amendment only extended the statute to regulate emissions from “hazardous waste treatment, storage, and disposal facilities.”\textsuperscript{44} When enacting the amendment, the Senate Committee on Environment and Public Works stated that the Environmental Protection Agency has authority to regulate these types of emissions under the Clean Air Act, but that its “performance under that Act ha[d] been appallingly slow” and therefore the extension of RCRA was warranted.\textsuperscript{45} Hence the 1984 RCRA amendment only covered emissions already within the scope of the Clean Air Act.\textsuperscript{46} And since railyards fall outside the Clean Air Act’s regulatory scope, railyard emissions are likewise excluded from RCRA’s extended regulatory reach.\textsuperscript{47} For these reasons, the Ninth Circuit found that the “gap” the plaintiffs sought to fill by harmonizing RCRA and the Clean Air Act was an intentional decision by Congress that the court was not empowered to change.\textsuperscript{48}

III. \textsc{Analysis}

The Ninth Circuit’s treatment of the plaintiffs’ argument in \textit{CCAEJ} illustrates judicial reluctance to expand the scope of environmental legislation. The plaintiffs asked the court to accept an interpretation of the Clean Air Act and RCRA’s amendments that would expand and conflate the acts in order to cover an environmental hazard that neither law regulates on its own: air emissions from indirect sources such as railyards. In rejecting this approach, the Ninth Circuit cited legislative history showing a clear decision by Congress to exclude indirect sources from federal oversight.\textsuperscript{49} In this sense the court’s decision should be commended. Judicial overreach was rejected in favor of allowing the legislature to make and pass laws.

Yet, while the court employed the correct legal reasoning, it left the communities represented by the plaintiffs unprotected from DPM emissions. DPM carries health risks for the surrounding communities ranging from mild

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\textsuperscript{41} Id. at 1024.
\textsuperscript{42} Id. at 1029.
\textsuperscript{43} Id.
\textsuperscript{44} 42 U.S.C. § 6924(n) (2012).
\textsuperscript{45} S. REP. NO. 98-284, at 63 (1983).
\textsuperscript{46} 764 F.3d at 1029.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 1030.
\textsuperscript{49} Id. at 1029–30.
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irritation to respiratory disease and lung cancer. In San Bernardino, the BNSF railyard is located directly across the street from a local park. In their initial complaint, the plaintiffs cited a study from the University of Southern California’s Keck School of Medicine that indicates children in the area have “the slowest lung growth and weakest lung capacity of all children studied in Southern California.” The plaintiffs also referenced a Health Risk Assessment conducted by the California Air Resources Board finding that local residents have the highest cancer risk of all communities studied in the state. Railyards’ health effects compound nearby residents’ other disadvantages. Many nearby communities are economically disadvantaged. As a result, residents often have inadequate access to health care. These vulnerable communities are at even greater risk from excessive DPM exposure, and the court’s decision does nothing to stop it.

The plaintiffs, however, have been working in other ways to decrease the railyards’ impact on community health. The Center for Community Action and Environmental Justice has created a “Platform for Action” that “go[es] to great lengths to reduce the health impacts” from BNSF’s railyard. The Platform for Action includes plans to separate the community from the railyard with trees and walls, creating a buffer for the community. In addition, the East Yard Communities for Environmental Justice has been leading a push for the State of California to regulate railyards itself. The CCAEJ decision exposed a regulatory gap that prevented the plaintiffs from relief at the federal level. Yet, the plaintiffs can use this decision to show state legislators that change is needed.

When communities are put at risk, environmental justice organizations should follow the plaintiffs’ approach in CCAEJ: seek relief from the court; if there is no clear path for relief, use the court’s decision to push legislators to regulate the harmful activity while organizing community members to curb adverse health effects through innovative means.

50. Safety and Health Topics: Diesel Exhaust, supra note 5.
52. First Amended Complaint for Declaratory and Injunctive Relief at 3, Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry. (CCAEJ), 764 F.3d 1019 (9th Cir. 2014).
53. Id.
54. Id.
55. Id.
56. San Bernardino Campaigns, supra note 51.
57. Id.
CONCLUSION

CCAEJ illustrates litigation’s role as a single component of a broader environmental advocacy campaign. The plaintiffs brought a suit to restrict railyards’ harmful DPM emissions under the theory that RCRA and the Clean Air Act should be harmonized. Had the court accepted this theory, the decision would have paved the way for similar RCRA citizen suits to limit air emissions from indirect sources. However, the court rejected harmonization. As a result, the plaintiffs now have a judicial opinion that explicitly states there is a regulatory gap in the legislation. The environmental organizations may use this to encourage legislators to further regulate harmful air pollutants. Along with bringing this suit, the plaintiffs also engaged in community organizing to mitigate harmful effects at the source by educating residents and planning for physical barriers to separate the railyards from the neighborhood.

Environmental justice organizations should engage in a similar multifaceted strategy that allows them to utilize court decisions, either for or against them, to advance their cause and create a healthier environment. By integrating legal action with a broader policy movement, communities are empowered to transform the health of their environment and propagate change.

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61. San Bernardino Campaigns, supra note 51.

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org/.