

WASTE NOT WANT NOT: THE IMPACT OF EPA'S DECISION TO CONSIDER RECLASSIFYING DISCARDED POLYVINYL CHLORIDE AS A HAZARDOUS WASTE

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U.S. Environment, Land, and Natural Resources Alert

By: Molly K. Barker, Robert M. Smith

On 3 May 2022, the Center for Biological Diversity (CBD) announced it had settled its case against the U.S. Environmental Protection Agency (EPA) in *Center for Biological Diversity v. U.S. Environmental Protection Agency, et al.* (Civ. No.: 1:21-CV-2210-JDB), filed in the United States District Court for the District of Columbia. In this case, CBD alleged EPA had failed to make a timely decision as to whether to list discarded polyvinyl chloride (PVC) as a hazardous waste under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (RCRA). The consent decree proposed by the parties requires that EPA make a tentative decision on listing by 20 January 2023 and a final determination by 12 April 2024. This is likely to impact a variety of industries, including aquaculture, construction, and contaminated site remediation.

PVC is commonly used by the aquaculture industry. For example, it is used in fish and shellfish hatcheries to form intake and discharge pipes; shellfish farms use PVC piping to anchor and elevate intertidal longlines and rack-and-bag operations; and finfish farms may use PVC materials in a variety of gear. In the event that PVC gear or piping comes free due to storm activity or other causes and cannot be recovered, it could be deemed “disposed of” or “abandoned” under RCRA. Similarly, PVC is also used routinely as a casing for groundwater monitoring wells at contaminated sites, as well as in industrial, commercial, and residential plumbing and electrical conduits. If PVC is listed as a hazardous waste by EPA, then monitoring wells could no longer be “abandoned in-place” in accordance with common industry practice and state regulations, and waste PVC from construction and remodeling projects could no longer be disposed in solid waste landfills along with other construction debris.

The settlement was born out of a petition filed by CBD to EPA on 24 July 2014 that requested that EPA initiate a rulemaking process on the harmfulness of “discarded PVC” and that EPA ultimately classify discarded PVC as a hazardous waste under RCRA.¹ After no movement on the part of EPA in response to the petition, on 19 August 2021, CBD ultimately filed a lawsuit against EPA.

RCRA is best known as the “cradle to grave” mechanism for EPA to control hazardous and solid waste, from generation to transportation, treatment, storage, and disposal. One of its primary goals is to ensure that hazardous and solid waste is properly disposed of. RCRA defines “hazardous waste,” as any solid waste that, among other things, may pose a “potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.”² Generally, RCRA applies to hazardous waste or solid waste that, among other things, is “abandoned,” “recycled,” or “disposed of,” which is defined as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or

on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”³ EPA may address past or current violations of RCRA by assessing a civil penalty, requiring compliance immediately or within a specified period of time, or by commencing a civil action in federal court.⁴ Companies can also be subject to civil suits from private parties.⁵

If PVC becomes listed as a hazardous waste, EPA will be able to regulate all generators, transporters, and owners and operators of storage, treatment, and disposal facilities of “discarded PVC” by requiring these regulated entities to comply with manifest, record-keeping, and reporting protocols. This likely will include a robust manifest system for PVC to track generation, transport, receipt, and disposal of PVC materials.⁶ Further, companies could be subject to enforcement actions and penalties brought by EPA or private citizen suits for improperly disposing of PVC material.

Aquaculture and other affected industries should track these developments closely, engage EPA on this issue as they consider whether to list discarded PVC as a hazardous waste under RCRA, and provide public comments when possible on EPA’s tentative listing decision. For example, the industry could push for (a) a certain threshold to be excluded from regulation under 40 C.F.R. § 261.4 or 40 C.F.R. § 262.14 under which a certain amount of discarded PVC would not be actionable under RCRA, or (b) that the aquaculture industry should not be required to comply with RCRA so long as they comply with other laws relating to the shellfish farm infrastructure (similar to the farmer exemption under RCRA⁷). This issue also highlights the importance to aquaculture growers of maintaining a robust gear management plan and frequently checking and maintaining gear to avoid potential escapement.

The members of K&L Gates’ Environment, Land, and Natural Resources practice can assist any company seeking additional information or strategic advice as to how to engage on this issue.

FOOTNOTES

¹ Proposed Consent Decree, Unreasonable Delay Claim Regarding Discarded Polyvinyl, pp. 2, 4.

² 42 U.S.C. § 6903(5)(B).

³ 40 C.F.R. §§ 260.10, 261.2.

⁴ 42 U.S.C. § 6928(a)(1). Civil penalties can run up to US\$25,000 per day of noncompliance for each violation of a requirement under RCRA. 42 U.S.C. § 6928(a)(3).

⁵ *Id.* § 6972(a)(1)(A).

⁶ *Ctr. for Biological Diversity v. U.S. Env’t Prot. Agency*, Complaint, Civ. No. 1:21-cv-2210, at 10, 13.

⁷ See 40 C.F.R. § 262.70.

KEY CONTACTS



MOLLY K. BARKER
ASSOCIATE

SEATTLE
+1.206.370.7653
MOLLY.BARKER@KLGATES.COM



ROBERT M. SMITH
PARTNER

SEATTLE
+1.206.370.5743
ROBERT.SMITH@KLGATES.COM

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