Environmental Claims Journal

ISSN: 1040-6026 (Print) 1547-657X (Online) Journal homepage: https://www.tandfonline.com/loi/becj20

Center for Biological Diversity v U. S. Forest Service: A New Type of Claim or Just Another Step in the Chain of Causation?[1]

Aaron Gershonowitz & Brian Kennedy

To cite this article: Aaron Gershonowitz & Brian Kennedy (2019): Center for Biological Diversity v U. S. Forest Service: A New Type of Claim or Just Another Step in the Chain of Causation?[1], Environmental Claims Journal, DOI: 10.1080/10406026.2019.1704518

To link to this article: https://doi.org/10.1080/10406026.2019.1704518

Published online: 30 Dec 2019.

ENVIRONMENTAL CLAIMS JOURNAL
https://doi.org/10.1080/10406026.2019.1704518

Routledge
Taylor & Francis Group

Center for Biological Diversity v U. S. Forest Service: A New Type of Claim or Just Another Step in the Chain of Causation?[1]

Aaron Gershonowitz and Brian Kennedy

Forchelli Deegan Terrana LLP, Uniondale, New York, NY, USA.

ABSTRACT
This article discusses what it means to "contribute" to waste disposal as that term is used in section 7002 of the Resource Conservation and Recovery Act. More specifically, the article examines whether the US Forest Service can violate section 7002 by not regulating hunting. Among the issues addressed are whether one can contribute to waste disposal passively, whether one can contribute to waste disposal without taking any action that addresses waste disposal and the extent to which the statutory term "contribute" is analogous to the common law concept of causation.

KEYWORDS
RCRA; Contribute; USFS

This article will discuss the outer limits of responsibility, specifically, when is a result so far removed from an alleged wrongful act that it is unfair to hold the actor responsible for the result? The question is raised in the recent 9th Circuit decision in *Center for Biological Diversity v U. S. Forest Service*[2]. A group of environmental organizations brought an action against the United States Forest Service (USFS) based on section 7002 of the Resource Conservation and Recovery Act (RCRA), which creates a right of action against any person who "has contributed to or is contributing to … disposal of solid or hazardous waste which may present an imminent threat to health or the environment." The theory of the case is that when a hunter shoots at an animal on land regulated by the USFS, the unretrieved bullet is a disposal of solid or hazardous waste; the USFS is contributing to that disposal by not prohibiting or better regulating hunting; and there is an imminent threat to the environment because an animal may consume a bullet and die of lead poisoning.[3]

CONTACT Aaron Gershonowitz AGershonowitz@ForchelliLaw.com

[1] Aaron Gershonowitz and Brian Kennedy. Aaron Gershonowitz is a partner at Forchelli Deegan Terrana, LLP in Uniondale, New York, where he concentrates on environmental law. He is also an adjunct faculty member at St. Francis Law School. Brian Kennedy is an associate at Forchelli Deegan Terrana, LLP, where he concentrates on municipal law and environmental law. Gianni Sbarro, a third-year law student ad St. John's University School of Law, assisted in the preparation of this article.

[2] *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d 1041, 1044 (9th Cir. 2019) (citing 42 U.S.C. § 6972(a)(1)(B)).

[3] *Center for Biological Diversity v United States Forest Service*, 925 F.3d 1041 (9th Cir. 2019). Plaintiffs faced a number of procedural issues, with the suit being dismissed for lack of standing to sue and then for lack of

This article will analyze the issue of what it means to "contribute" to waste disposal and whether that is something that can be done passively. It will also discuss the relationship between the statutory term "contribute" and the common law concepts of duty and causation. It will conclude that "contribute" is a statutory term that is mostly independent of the common law principles of duty and causation, one can "contribute" passively and the act or omission of the USFS in this case was not too remote to be responsible for the alleged injury.

Background

A helpful starting point for a discussion of common law duty and causation is the New York Court of Appeals decision in *Palsgraf v. Long Island Railroad*.[4] An employee of the railroad tried to assist a passenger boarding a train and accidentally knocked a package out of the passenger's hand.[5] The package contained fireworks, which exploded when it hit the platform.[6] The explosion shook the platform causing a scale to fall off the wall on the far end of the platform, injuring Mrs. Palsgraf.[7] Mrs. Palsgraf sued for negligence[8] and the New York Court of Appeals opinions of both Justices Cardozo and Andrews are the subject of much discussion in first year law school classes, as well as in the caselaw.

Justice Cardozo concluded that there was no liability because the railroad did not owe a duty to Mrs. Palsgraf.[9] He reasoned that negligence is based on the breach of a duty owed to the plaintiff and a duty is owed only when it is reasonably foreseeable that there is a risk of harm to the plaintiff.[10] The railroad employee had no reason to know what was in the package and could not have reasonably foreseen a risk to Mrs. Palsgraf.[11] He, therefore, had no duty to take precautions. No duty means no negligence and no liability.[12]

Justice Andrews disagreed with Cardozo on the duty issue.[13] He reasoned that there was a duty because everyone has a duty to take precautions to protect members of the public.[14] However, he would have analyzed

jurisdiction, and it was not until more than six years after serving the complaint that an appellate court first discussed the substantive issue of whether the complaint states a cause of action.

[4] *Palsgraf v. Long Is. R.R. Co.,* 248 N.Y. 339 (1928).
[5] *Id.* at 341.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 345.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 347.
[14] *Id.* at 349.

the issue regarding Mrs. Palsgraf as an issue of proximate cause.[15] The law does not hold people responsible for all of the consequences of their actions. Responsibility is limited by the concept of proximate cause, which means that a person is responsible only for the reasonably foreseeable consequences of their actions.

Justices Cardozo and Andrews agreed that the key factor in determining responsibility for remote injuries is reasonable foreseeability. For Justice Cardozo, there is no duty owed to a person to whom injury is not reasonably foreseeable at the time of the alleged negligent act or omission.[16] To Justice Andrews, if the injury that occurred is not reasonably foreseeable at the time of the alleged negligent act or omission, the act or omission is not the proximate cause of the injury.[17]

The Ninth Circuit's decision in *Center for Biological Diversity* suggested that plaintiffs might overcome the duty/foreseeability issue because the Restatement (Second) of Torts section 839 imposes a duty on property owners with regard to conditions on their land and the USFS may be viewed as a property owner with regard to federal lands.[18]

Section 839 of the Restatement states:

> "a possessor of land is subject to liability for a nuisance caused while he is in possession by an abatable artificial condition on the land, if the nuisance is actionable and
>
> a. the possessor knows or should know of the conditions …
> b. he knows that it exists without the consent of those affected by it, and
> c. he has failed, after a reasonable opportunity, to take steps to abate the condition or to protect the affected persons against it.

The plaintiffs' claim is supported by the theory that there is an analogy between a nuisance and an imminent threat to health or the environment and the USFS has liability because (i) it is a possessor of land, that it knows or should know of the conditions described by plaintiff; (ii) it knows there has been no consent to that condition; and (iii) it failed to take precautions.

The Ninth Circuit cited the alternative view, that this is a RCRA action and common law principles of land ownership are not applicable.[19]

Defendants argued that the Ninth Circuit's decision in *Hinds Investments, L.P. v. Angioli*,[20] is controlling.[21] In *Hinds*, owners of shopping centers that housed dry cleaning businesses, sued the manufacturers of

[15] *Id*. at 352.
[16] *Id*. at 346.
[17] *Id*. at 354.
[18] *Ctr. for Biological Diversity*, 925 F.3d at 1052 (citing Restatement (Second) of Torts § 839 (Am. Law Inst. 1979)).
[19] *Ctr. for Biological Diversity*, 925 F.3d at 1052.
[20] *Hinds Invs., L.P. v. Angioli,* 654 F.3d 846 (9th Cir. 2011).
[21] Brief for Defendant-Appellee at 14, *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d 1041 (9th Cir. 2019) (No. 17-15790).

dry-cleaning equipment under RCRA, alleging that the design of the equipment contributed to the disposal of hazardous waste.[22] Plaintiffs argued that the manufacturers contributed to the waste disposal by designing machinery that generated and discharged hazardous waste that needed to be disposed of by others.[23] The court rejected that argument, noting that when the statute spoke of contributing, it said contributing to "handling, storage, treatment, transportation and disposal of hazardous waste" – all activities that involve some degree of control over the waste.[24] The manufacturers, on the other hand, never had any element of control over the waste.[25] Contributing, the court concluded "requires a more active role with a more direct connection to the waste."[26]

The *Hinds* court noted that its conclusion requiring active involvement in waste handling or disposal is consistent with the majority of other courts that have examined the issue.[27] The court cited the Seventh Circuit's decision in *Sycamore Industrial Park Associates v Ericsson, Inc.*,[28] which stated that "RCRA requires active involvement in the handling or storing of materials for liability."[29] The court also cited *Interfaith Community Organization v Honeywell International Inc.*[30] as further support for the conclusion that only active involvement with the waste can result in liability.

The *Hinds* Court also reasoned that even those courts that don't require active involvement in waste disposal would agree that the manufacturers could not be liable.[31] The court cited several courts that hold that authority to control waste disposal is enough for liability.[32] For example, In *United States v Aceto Agricultural Chemicals, Inc.*, defendants were a group of pesticide companies that retained Aceto to formulate the pesticides.[33] Defendants controlled most of the processes at the Aceto facility and also claimed ownership of both the raw materials and the products produced at the facility, but never participated in waste handling activities or decisions.[34] Based on that, the court concluded that the manufacturers could

[22] *Hinds*, 654 F.3d at 848.
[23] *Id.* at 851.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* (citing *Sycamore Industrial Park Associates v. Ericsson, Inc.* 546 F.3d 847 (7th Cir. 2008)).
[29] *Id.*
[30] *Id.* (citing *Interfaith Community Organization v. Honeywell International Inc.*, 264 F. Supp 2d 796, 844 (D. N.J. 2003), affd,. 399 F.3d 248 (3d Cir. 2005)).
[31] *Id.*
[32] *Id.* (citing *United States v Aceto Agric. Chems, Inc.*, 872 F.2d 1373, 1383 (8th Cir. 1989); Marathon Oil Co. v Texas City Terminal Railway Co., 164 F. Supp.2d 914 (S.D. Tex. 2001); United States v Valentine, 885 F. Supp. 1506, 1512 (D. Wyo. 1995)).
[33] *Aceto*, 872 F.2d at 1375.
[34] *Id.* at 1376.

have RCRA liability because they had the authority to control waste disposal activities.[35]

Defendant's common law argument

Defendant argued that there is nothing in RCRA to suggest that Congress intended to use common law nuisance theory to define the term "contribute" in RCRA.[36] Defendant used CERCLA to bolster this argument.[37] Nuisance law is based on duties that arise out of property ownership. CERCLA also provides for liability based on property ownership. RCRA, on the other hand has no provision that imposes liability based on property ownership. By providing explicitly for liability based on ownership in CERCLA and not providing any mention of owner liability in RCRA, Congress showed its intent not to base RCRA liability on property ownership.

Defendant's RCRA argument

Defendant argued that the claim should be dismissed because plaintiff failed to state a claim under RCRA.[38] Defendant listed the elements of a RCRA claim as follows: plaintiff must plead sufficient facts to allege that (1) defendant has contributed or is contributing to (2) the past or present storage, handling or treatment of (3) solid or hazardous waste which (4) may present an imminent and substantial danger.[39] Most of defendant's argument addressed the first element - whether the facts alleged by plaintiff sufficiently allege that that defendant has contributed or is contributing.

Defendant relied on *Hinds* for the proposition that to state a claim, a plaintiff must allege that defendant "had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process."[40] Plaintiff's had merely alleged that defendant owned the land, failed to exercise its authority to regulate and that it had issued permits to hunting outfitters and guides.[41]

A key issue is whether alleging that defendant has unexercised authority is sufficient to allege contribution. Defendant argued that it is not because "passivity" without more is insufficient to make a person a contributor.[42] Defendant argued that the statute requires that defendant contribute to

[35] *Id*. at 1383.
[36] Brief for Defendant-Appellee at 35, *Ctr. for Biological Diversity v. U.S. Forest Serv*., 925 F.3d 1041 (9th Cir. 2019) (No. 17-15790).
[37] *Id*.
[38] *Id*. at 24.
[39] At *24, citing 42 U.S.C. § 6972(a)(1)(B).
[40] Citing *Hinds*, at 851.
[41] Brief for Defendant-Appellee, *supra* note 35, at 25.
[42] *Id*. at 26.

"handling, storage, treatment, transportation or disposal," and all of those are active functions with a direct connection to the waste.[43] Thus, to contribute requires an active function with direct connection to the waste.[44]

Defendant further argued that *Hinds* supports this active involvement standard because *Hinds* required active involvement or a measure of control over the waste.[45] It is difficult to see how this argument helps defendant, as plaintiff seems to have alleged a measure of control, i.e. unexercised authority to control.

Defendant tried to draw an analogy between the defendants in *Hinds* and the Forest Service.[46] Just like the *Hinds* defendants exercised no control over the waste disposal process, the Forest Service exercised no control over the waste disposal process.[47] Again, it is very difficult to see how this argument helps the defendants. The manufacturers of dry-cleaning equipment had no authority or opportunity to control the waste disposal process. Once the equipment was sold, the manufacturers could not control how it was used. The Forest Service, however, as a property owner or as a regulatory agency may have had the authority to control waste disposal on federal lands.

Defendant cited a significant body of RCRA caselaw and argued that each finding of contribution was associated with active involvement.[48] None of the cases, however, say that authority to control is insufficient. Indeed, defendant's use of the *Aceto* case is especially interesting because *Aceto* seems to be a case of unexercised authority and it is enough. In *Aceto*, defendants never touched the waste and never told anyone what to do with the waste.[49] They merely contracted for the manufacture of pesticides with an agreement whereby they provided the raw materials, retained ownership of the raw materials and provided the specifications for the manufacturing process, the process whereby the waste was created.[50] They never told the manufacturer what to do with the waste.[51] Defendant argues that keeping ownership of the materials and setting specifications for manufacture is active involvement.[52]

Defendant's strongest argument is that the Forest Service has no authority to control hunting on federal lands.[53] It argues that the regulations require it to consult with a State Commission on regulations, making that

[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 27.
[47] *Id.*
[48] *Id.* at 28.
[49] *Aceto*, 872 F.2d at 1375-76.
[50] *Id.*
[51] *Id.*
[52] Brief for Defendant-Appellee, *supra* note 35, at 28.
[53] *Id.* at 32.

State Commission the party that controls hunting.[54] The fact issue of whether defendant has the authority to control is disputed by the parties. As a matter of law, however, it makes sense to treat someone who has authority to control and decides not to exercise that control as significantly different from someone who does not believe they have authority to control and decides not to. The former has made a decision not to exercise control and that decision may be the "active involvement" needed to contribute. The latter, however, has not made any decision that affects disposal.

Plaintiffs' common law argument

Plaintiffs argued that the law of common law nuisance should be used to interpret RCRA because the federal environmental laws have their roots in the common law of nuisance.[55] Pursuant to the theory of common law nuisance, a person with exclusive control over the land and the things done upon it "should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others."[56]

Plaintiffs cited the Fourth Circuit's decision in *United States v. Waste Industries, Inc.*[57] to support their common law argument. *Waste Industries* was one of the earliest appellate RCRA cases and the court noted that the statute enhances a court's common law powers to require abatement of hazardous conditions on property.[58] That means that if a landowner would have a duty pursuant to nuisance law, that landowner should also be a contributor pursuant to nuisance law.

Plaintiffs' RCRA argument

Plaintiffs also relied on *Hinds*.[59] They argued that they have made sufficient allegations of contribution because the complaint alleged that defendant has "a measure of control over the waste."[60] Plaintiffs' argument goes further, however, suggesting that defendant is responsible for this waste disposal because it has responsibility for activities that take place on federal land.[61]

Plaintiffs started by explaining that they are relying on *Hinds*' language regarding having a measure of control, not on the facts of *Hinds*.[62]

[54] *Id*.
[55] Appellants Center for Biological Diversity Reply Brief at 15, *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d 1041 (9th Cir. 2019) (No. 17-15790).
[56] *State of New York v Shore Realty*, 759 F.2d 1032, 1051 (Discussing the relationship between common law nuisance and CERCLA liability).
[57] *United States v. Waste Industries, Inc*. 734 F.2d 159 (4th Cir. 1984).
[58] Id. at 168 ("Congress chose to enhance the courts' traditional equitable powers . . .").
[59] Appellants Center for Biological Diversity Reply Brief, *supra* note 54, at 10.
[60] *Id*.
[61] *Id*. at 11.
[62] Plaintiff noted that if it asserted a claim against all gun or ammunition manufacturers claiming that they contributed to the disposal, they would be asserting the theory that was rejected in Hinds.

In *Hinds* there was no liability because the defendant manufacturers were "wholly disconnected from the waste." Here, however, the Forest Service had the power to issue regulations that could have prevented this waste disposal. The Forest Service thus had "a measure of control" over waste disposal that was not present in *Hinds*.

Plaintiffs argued that their theory that ownership of the land on which the disposal occurs can result in RCRA liability has been accepted by other courts, citing, *Connecticut Coastal Fishermen's Association v Remington Arms Co.*[63] and *Potomac Riverkeeper v National Capital Skeet and Trap Club*.[64] Both cases alleged that gun club owners were contributing to waste disposal that may cause endangerment.[65] In both cases, the court found that the lead shot discharged by patrons could be a RCRA "solid waste" because it has been abandoned or disposed of.[66] Neither case, however, contained a discussion of what it means to contribute to the disposal or whether property ownership was a sufficient basis for liability, because in both cases, the property owner/defendant was engaged in the activity that resulted in the alleged waste disposal.

The analogy between the gun clubs and the Forest Service is a difficult one. In the gun club cases, the property owner invites people to its property for the purpose of shooting lead pellets. To the extent that shooting lead pellets is a form of waste disposal, these defendants are participants in the disposal. The Forest Service, on the other hand, is alleged to have not prohibited the activity, despite having the ability to do so. In terms of responsibility, that is very different from inviting the activity.

Plaintiffs also supported their property ownership argument with EPA guidance.[67] In its guidance document on the use of RCRA Section 7003, EPA states that among those who can be liable as contributors are owners of a facility at the time that the waste leaked from the facility.[68] That certainly shows that owners can be contributors. Plaintiffs' property ownership argument needs to do more, however, to show that a National Forest on which there is hunting is a facility from which hazardous waste is leaking and that the Forest Service is, indeed, in a position analogous to that of a property owner.

Plaintiffs cited several cases to support the premise that the government as a regulator is like a property owner. In *Foster v United States*,[69] the current owner of a site sued the District of Columbia and the federal

[63] *Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co.,* 989 F.2d 1305, 1316 (2d Cir. 1993).
[64] *Potomac Riverkeeper, Inc. v. Nat'l Capital Skeet & Trap Club, Inc,* 388 F. Supp.2d 282 (D. Md. 2005).
[65] *Conn. Coastal Fishermen's Ass'n*, 989 F.2d at 1316; *Potomac Riverkeeper*, 388 F. Supp. 282.
[66] *Id*.
[67] Appellants Center for Biological Diversity Reply Brief, *supra* note 54, at 17.
[68] *Id*.
[69] *Foster v. United States*, 922 F. Supp.642,660 (D. D.C. 1996).

government under both CERCLA and RCRA. In discussing the relevance of the governments' former ownership of the site, the court noted that it could not be said that the United States "lacked actual control over the disposal of wastes," and therefore found that there were sufficient issues of fact to prevent it from granting summary judgment.[70] The case, at best supports the conclusion that the federal government as property owner may, at some other site that it owned, have controlled waste disposal. It is very difficult to see how that supports the conclusion that the Forest Service contributed to waste disposal.

In *Holy Cross Neighborhood Organization v United States Army Corps of Engineers*,[71] plaintiffs sued to stop the Army Corps from dredging a canal, alleging that such dredging would contribute to the disposal of hazardous wastes that had been disposed of in the canal. The court held that the suit could proceed because the Army Corps can be liable for RCRA violations in its role as regulator.[72] As with the *Foster* case above, the case shows that the government can be liable as a regulator, but does not help very much in establishing that the Forest Service can be liable in this case. Dredging up contaminated sediments is much closer to contributing to waste disposal than not regulating hunting.

Plaintiffs use of *Aceto* is interesting. The Forest Service reasoned the *Aceto* case represents the outer limits of responsibility and this case is a far weaker case for liability because the Forest Service has less control over activities. Plaintiffs argue the opposite, i.e. that the Forest Service has more control over activities on federal land than the *Aceto* defendants had over the *Aceto* waste disposal activities.

What does contribute mean?

The *Hinds* Court used the dictionary definition of "contribute," in the absence of a definition in the statute.[73] It means "to lend assistance or aid to a common purpose" or to "have a share in any act or effect."[74] It also means "to help to cause."[75] What should be clear from the definition is that it does not take much to contribute. Contribute is less than cause. It does not appear from the definition that one has to intend to contribute; you can have a share in an effect accidentally. And, it is difficult to see how the definition of "contribute" supports defendant's argument that one cannot contribute passively.

[70] *Id*.
[71] *Holy Cross Neighborhood Ass'n v. U.S. Army Corps of Eng'rs,* 2003 WL 22533671 (E. D La. 2003).
[72] *Id*.
[73] *Hinds*, 654 F.3d at 850.
[74] Webster's Third New International Dictionary 496 (1993).
[75] The Random House Dictionary of the English Language 442 (2d Ed. 1987).

Examine the typical slip and fall negligence case. The store owner notices that someone has spilled liquid on the floor. The risk that someone will be injured on the slippery floor is reasonably foreseeable. The owner who takes no precautions, knowing that the burden of placing a warning sign or blocking off the area (or cleaning it up) is not great, could be liable for negligence. To find someone negligent requires a finding of causation, but it is not difficult to see inaction (e.g. failure to place warning signs) as a cause of injury. Contribute is less than cause. Therefore, if inaction can be a cause, it can certainly "contribute."

Defendant argued that "contribute" needs to be understood in the context of the statutory phrase "contributed or is contributing to … handling, storage, treatment, transportation or disposal …" Defendant pointed out that each of the things that must be contributed to is an action and therefore, contribute requires an action." That seems like a non sequitter. There is nothing in the statute to suggest that how one contributes must be similar to what one contributes to. It seems obvious that one can contribute passively. For example, if I own property, someone drives up to the property with a tanker of hazardous waste and expresses the intent to dump the waste on my property and I say OK, I have contributed to the disposal of the waste. My "OK" helped to cause or lent assistance, regardless of whether I took any action.

And, if you say that speech is an action then, the Forest Service's failure to regulate is active as well. At some point, someone must have made a decision not to regulate hunting. That decision, even if it happened after the lawsuit was filed, was an action. And, to the extent that there needs to be an action related to waste disposal, failure to regulate hunting seems to be more of a contributor to the disposal of bullets than the contribution by the pesticide manufacturers in *Aceto*. There was no evidence in *Aceto* that the manufacturers ever said or did anything with regard to waste disposal. However, their control of processes at the facility showed that they had the authority to control waste disposal. That unexercised authority seems to have been enough.

Does RCRA caselaw require more to contribute

The RCRA caselaw does not seem to require more involvement with the waste. In *Cox v City of Dallas*,[76] for example, a city contractor engaged in illegal dumping and the court held that was sufficient for a court to find that the City was contributing to the disposal. The City did not know about

[76] *Cox v. City of Dallas, Tex.*, 256 F.3d 281 (5th Cir. 2001).

this illegal dumping, but the court found that the City contributed by lax enforcement."[77] Lax enforcement is primarily passive. The City failed to prevent the dumping and that failure to prevent was sufficient.

One might argue that the City in *Cox* was significantly more involved with the waste than the Forest Service is because the City contracted for disposal. The Forest Service, on the other hand, was unaware of the waste disposal activity and even now disputes whether hunting is a waste disposal activity. Knowledge of or intent to be involved in waste disposal do not seem to be required.[78] The issue is whether the failure to regulate or lax enforcement played the same role in contributing to the disposal and it seems that there is a parallel.[79] In both cases, the allegation is that the government should have taken action to prevent disposal and failure to do so contributed to the disposal.

Additionally, it is difficult to argue that the action that is alleged to contribute to the disposal must be a waste-related activity because that was not the case in *Aceto*. In *Aceto,* defendants took no action with regard to the waste and the failure to do so, when combined with the apparent power to control waste disposal, contributed.[80]

The legislative history of RCRA also contains support for the conclusion that one can contribute by failure to act. Both the Senate and House Reports contain language about "failure to exercise due care" as a means of contributing.[81]

Both parties treat *Hinds* as the key decision to examine because it is the most recent 9th Circuit decision on the subject. The Forest Service's attempt to use *Hinds*, arguing that in both cases there was nothing the defendant could do to affect the disposal, fails because the court was not convinced that the Forest Service could not affect waste disposal. The Forest Service's power to affect waste disposal is probably a question of fact to be determined later, but for purposes of the motion to dismiss, that power is assumed. Plaintiffs' use of *Hinds* is also not particularly strong. The facts are sufficiently different such that at best, plaintiffs can use language that is merely dicta in the case.

Defendants correctly point out that in nearly all the published cases, defendants had more of an active role with regard to waste disposal. Defendant's use of that fact to argue that most courts require more, however, is flawed. That fact provides no basis for suggesting anything other than the more common case is an active involvement case.

[77] *Id*. at 297.
[78] See, *Cox* at 295-296 discussing whether the standard is strict liability and concluding that there was no need to decide that issue because the City had failed to exercise due care.
[79] *Id*.
[80] *Aceto*, 872 F.2d at 1376.
[81] 1980 U.S.C.C.A.N. 5019, 5023, cited by the Cox Court.

Does the forest service's ownership or control of the land matter?

Defendant's control of the property is important to the contribution issue because defendant's failure to regulate could contribute to the disposal only if defendant has ownership or control of the property. If defendant had no ability to affect the disposal activity, defendant could not be liable for contributing to the disposal.

Defendant's control of the property is also relevant to the issue of whether the result is too remote from the allegedly wrongful act to hold the defendant responsible. A first read of the case is likely to leave the reader thinking that there are too many steps between the allegedly wrongful act and the resulting endangerment for there to be liability. We need (1) failure to regulate; (2) hunting that leaves lead bullets behind; (3) a predatory bird to eat an animal with a bullet in it and (4) the predatory bird contracts lead poisoning. The statute, however, requires almost as many steps. The statute requires (1) an act that contributes to (2) a disposal of hazardous waste that (3) may create an endangerment.[82] The review of the steps required by the statute goes a long way to making these facts look sufficiently direct.

Ownership or control can also help plaintiffs' case because however we define "contribute", we know that it requires less than liability for a nuisance. There can be RCRA liability without a common law nuisance, but if facts are not too remote for nuisance liability, they are certainly not too remote for RCRA liability.

Conclusion

At first glance, the facts of this case appear to be a reach. To what extent can we say that someone who is not aware of a potential waste disposal and who takes no action with regard to that waste disposal be said to "contribute" to said waste disposal? The flaw in that question is that, once the defendant is made aware of the disposal issue, it is difficult to say that they took no action. At that point they must have made a decision to act or not act and, that decision could be enough of an action for RCRA liability. It is important to note that plaintiff is seeking an injunction, not damages. That is important because with regard to the bullets that are already at the site, it may be that a reasonable person in the position of the Forest Service would not foresee this alleged endangerment and thus there was no decision made that would contribute. Going forward, however, is a different story.

[82] 42 U.S.C. § 6972(a)(1)(B).

Another reason this fact pattern looks so difficult for the plaintiff is that in addition to whether the failure to regulate could be said to "contribute" to waste disposal, viewing shooting a gun as the disposal of solid waste requires some thought, both with regard to the definition of "disposal" and "solid waste." Additionally, whether there really is an imminent substantial endangerment to the environment from this activity is questionable. The presence of these issues, however, should not affect the analysis of whether the Forest Service can be seen as contributing.

The caselaw supports the conclusion that one can contribute passively; that just as an omission can cause injury, it can contribute to disposal. *Hinds* is an important decision, but because the manufacturers were not in a position to affect the disposal process, it is difficult to see any analogy between their act or omission and that of the Forest Service.

While the Forest Service may not be a property owner and it may not ultimately have liability, the case sends a message to property owners that they can be held liable for activities on their property and they should, therefore, take precautions to prevent actions that may contribute to an imminent and substantial endangerment to the environment.

Notes on contributor

Aaron Gershonowitz and Brian Kennedy. Aaron Gershonowitz is a partner at Forchelli Deegan Terrana, LLP in Uniondale, New York, where he concentrates on environmental law. He is also an adjunct faculty member at St. Francis Law School. Brian Kennedy is an associate at Forchelli Deegan Terrana, LLP, where he concentrates on municipal law and environmental law. Gianni Sbarro, a third-year law student ad St. John's University School of Law, assisted in the preparation of this article.