



ENVIRONMENTAL

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Administrator Michael S. Regan
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Sent via Certified Mail and via email to Regan.Michael@epa.gov

**RE: PETITION TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY FOR
RULEMAKING REGARDING REGULATIONS IMPLEMENTING THE RESOURCE
CONSERVATION AND RECOVERY ACT**

Dear Administrator Regan,

Please see the below petition regarding Ecological Rights Foundation's ("EcoRights") proposal for the U.S. Environmental Protection Agency ("EPA") to make certain revisions to its regulations implementing certain provisions of the Resource Conservation and Recovery Act ("RCRA").

I. INTRODUCTION

Through this petition for rulemaking ("Petition"), EcoRights seeks to have EPA revise its regulations implementing RCRA in order to remove unnecessarily burdensome notice provisions

for RCRA citizen suit notice letters. These notice provisions cause citizens to have to engage in redundant, overly burdensome actions that are in excess of RCRA's statutory notice requirements and that result in delay and expense that interferes with their enforcement of RCRA while providing no benefits. Removing these impediments to RCRA citizen suits would result in more effective and less costly administration of RCRA while still providing for effective notice to violators, which is in service of the goals of the RCRA citizen suit provision.

II. PETITIONER

EcoRights is a non-profit public benefit corporation with an office in Blocksburg, California and members throughout the United States. Among other work it does, EcoRights focuses on protecting surface waters and groundwater from pollution and degradation. EcoRights represents citizens who are striving to protect soil and waterways from pollution and secure the multitude of public and private benefits that follow from clean soil and from pure water: reduced incidences of cancer and birth defects; safe drinking water; abundant and diverse wildlife populations; healthy recreational opportunities; food uncontaminated by toxic chemicals; economic prosperity from commercial, sport, and subsistence fishing; and other recreational, spiritual, and commercial activities that depend on clean soil and pure water. In carrying out its mission, EcoRights uses a variety of state and federal environmental laws, including extensive use of RCRA.

III. ACTION REQUESTED

EcoRights requests that EPA:

- (1) Allow service on violators by Certified Mail rather than Registered Mail;
- (2) Make clear that the RCRA notice period begins running on the date of mailing the citizen suit notice letter, not on the date shown on the return receipt card, or, in the alternative, that service is effective where online tracking shows the notice letter was delivered;
- (3) Provide that service of a notice letter can take place through any online portal created by state or federal agencies, if any, to provide for more efficient administration through the development of future technologies; and
- (4) Limit the entities that must be served with notice to be coextensive with those required by RCRA itself.

IV. LEGAL AND FACTUAL BACKGROUND

RCRA allows citizens to file citizen suits, *inter alia*, “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 facility, 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.” 42 U.S.C. § 6972(a)(1)(B). Subject to certain statutory requirements, the RCRA citizen suit notice provision provides EPA with the authority to promulgate notice regulations for these citizen suits. 42 U.S.C.S. § 6972(c) (“Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.”).

For citizen suits, RCRA’s statutory language requires that a citizen suit plaintiff provide the EPA Administrator, the State in which the alleged endangerment may occur, and the RCRA violator with notice of their violations of RCRA 90 days before filing a citizen suit to correct such violations. 42 U.S.C. § 6972(a)(2)(A). The form of notice and the method by which such notice period is calculated is not specified in RCRA itself, thus leaving EPA with discretion to promulgate regulations addressing these issues.

EPA’s RCRA citizen suit notice regulations currently provide that:

(a) Notice of intent to file suit under subsection 7002(a)(1) of the Act shall be served upon an alleged violator of any permit, standard, regulation, condition, requirement, or order which has become effective under this Act in the following manner:

(1) If the alleged violator is a private individual or corporation, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the owner or site manager of the building, plant, installation, or facility alleged to be in violation. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred. If the alleged violator is a corporation, a copy of the notice shall also be mailed to the registered agent, if any, of that corporation in the State in which such violation is alleged to have occurred.

(2) If the alleged violator is a State or local agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of that agency. A copy of the notice shall be mailed to the chief administrator of the solid waste management agency for the State in which the violation is alleged to have occurred, the Administrator of the Environmental Protection Agency, and the Regional

Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred.

(3) If the alleged violator is a Federal agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of the agency. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, the Attorney General of the United States, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred.

...

(c) Notice given in accordance with the provisions of this part shall be considered to have been served on the date of receipt. If service was accomplished [sic] by mail, the date of receipt will be considered to be the date noted on the return receipt card.

40 C.F.R. § 254.2.

EcoRights has served numerous citizen suit notice letters on RCRA violators and the other required entities over well over a decade of citizen suit enforcement under RCRA. During this time, EcoRights has experienced numerous problems with EPA's RCRA notice regulations that have hampered its ability to timely bring RCRA citizen suits and that have increased the cost and burden of bringing such suits with no concomitant benefits. As a result of these experiences, EcoRights hereby petitions EPA to make changes to these regulations that will streamline them and remove barriers to Congress' intended citizen enforcement of RCRA.

V. REASONS FOR MAKING REQUESTED REVISIONS

A. Replace requirement for service of citizen suit notice letters by Registered Mail with service by Certified Mail.

As discussed above, EPA's current RCRA regulations require that service be by Registered Mail, return receipt requested, or by personal service on various entities. Service by Registered Mail is unduly burdensome for various reasons. USPS describes Registered Mail as "[t]he most secure United States Postal Service® mail service (protected by safes, cages, sealed containers, locks, and keys)." <https://faq.usps.com/s/article/Registered-Mail-The-Basics>. This makes sense given that "[c]ommercial customers shipping cash amounts of over \$500 are required to use Registered Mail" and that Registered Mail can be insured up to \$50,000. *Id.* In short, Registered Mail is USPS's most secure shipping method, to be used for items of inherent monetary value, including large sums of cash. It is not intended for shipment of items of no inherent value, such as the sheets of paper constituting RCRA citizen suit notice letters.

In addition to being unnecessary, it is also expensive due to the extensive security precautions associated with Registered Mail, and time consuming given that senders need to tape every seam on such mail with special tape in addition to the other mailing requirements. There is, of course, an argument that secure, trackable shipping should be required for citizen suit notice letters as failure of an entity to bring itself into compliance with the law during the notice period opens the entity up to civil penalties and other liability. However, there is no evidence that Certified Mail would not be just as effective. For example, EPA's regulations implementing the Clean Water Act ("CWA") provide for service of citizen suit notice letters by Certified Mail, 40 C.F.R. § 135.2, and there is no indication that this has created serious problems in the past.

That the CWA allows for service of citizen suit notice letters by Certified Mail is also the source of another main reason that the price of Registered Mail is an *undue* burden rather than a reasonable litigation cost for plaintiffs. EcoRights and other plaintiffs often bring lawsuits alleging violations of both RCRA and the CWA for related conduct by the same polluters. Even where the RCRA and CWA claims are included in the same citizen suit notice letter, as is EcoRights' practice and the practice of many other plaintiffs, the conflicting service requirements, Registered Mail and Certified Mail respectively, cause EcoRights and these other plaintiffs to print and mail the same notice letter to an overlapping group of entities once for each statute by each mailing means. Therefore, by requiring that service take place under more expensive Registered Mail for RCRA claims, EPA's regulations more than double the notice costs without adding any benefits for these RCRA/CWA cases. Indeed, given that there are numerous third-party online services that will allow you to send Certified Mail from your computer without the need to leave your office, allowing service by Certified Mail would save citizens from the additional hassle and expense of printing notice letter documents; preparing envelopes; preparing Certified Mail or Registered Mail labels (and return receipt cards under the current regulations), much of which must be done by hand; and spending significant time at the post office while Postal Service employees undertake the work-intensive process of preparing these documents for mailing. For these reasons, EPA should change its RCRA regulations to allow for service of citizen suit notice letters by Certified Mail.

B. Calculate the start of the citizen suit notice period by the date of mailing or, in the alternative, remove the requirement to procure return receipt cards to prove receipt of citizen suit notice letters.

The provision in EPA's RCRA regulations that the notice period does not begin to run until the date on the return receipt card where served by Registered Mail has caused serious delays in EcoRights' citizen suits and has even drawn a motion to dismiss in one instance. Under EPA's regulations, the notice period does not begin to run until the "date of receipt," and, "[i]f service was accomplished [sic] by mail, the date of receipt will be considered to be the date noted on the return receipt card." 40 C.F.R. § 254.2(c). The primary problem with this requirement is that it relies on the use of "return receipt cards." In EcoRights' experience, as many as about 20% of these return receipt cards do not make it back to the sender for mail that is actually delivered through to the recipient. In speaking to U.S. Postal Service employees, EcoRights is aware that machines moving mail through the system often rip these cards off, they are often not removed from the package after signature and placed back into the mail, or they are otherwise lost in the shipping process. It also often takes two weeks or more to get these return receipt

cards back after mailing the notice letter to its recipient, meaning that EcoRights cannot be sure it will not be getting a return receipt card back until three or more weeks after mailing, causing it to try mailing again or to incur the additional substantial expense of personal service to ensure that the notice period begins running. Indeed, EcoRights noticed that EPA Region IX, a required recipient under EPA's current regulations for all of EcoRights' California RCRA lawsuits, virtually never returned these cards, causing EcoRights to serve them personally on several occasions after already successfully providing them with copies of the notice letter by Registered Mail. This cost EcoRights, a nonprofit entity, hundreds of additional dollars in service costs *for citizen suit notice letters that the Regional Administrator had already verifiably received*. The only thing missing was the return receipt cards.

While EPA likely included this requirement to ensure that the required entities were actually served, it is unnecessary today and serves only to burden would be citizen suit plaintiffs and to hamper enforcement of RCRA. The reasons are at least three-fold: (1) EPA has long provided that the date of mailing is the date on which the notice period begins for the CWA, with no noted ill-effects; (2) all Registered Mail and Certified Mail is trackable online, allowing for confirmation of service without the need to wait for and receive the return receipt cards; and (3) return receipt cards add one more cost to mailing, albeit smaller than the duplicate service cost of requiring Registered Mailing, discussed above.

EPA's CWA regulations provide that "[n]otice given in accordance with the provisions of this subpart shall be deemed to have been served on the postmark date if mailed, or on the date of receipt if served personally." 40 C.F.R. § 135.2(c). As is plain, this is a date of mailing trigger to start the notice period, as compared to the date of receipt, as determined sometime in the future should the return receipt card ever make it back to the citizen suit plaintiff. There is no reason for this discrepancy. Indeed, RCRA already provides a 90-day notice requirement, as opposed to 60 days under the CWA, giving RCRA violators even more time to come into compliance after mailing of a notice letter than CWA violators. Given that a date of mailing trigger for the CWA has functioned suitably for decades, EPA should adopt such a trigger for the RCRA regulations in response to this Petition.

Should EPA decline to adopt a date of mailing trigger for running of the RCRA notice period, the requirement that citizen suit plaintiffs obtain return receipt cards should be eliminated because it does nothing more to prove the fact or date of service than providing electronic tracking information obtained from the U.S. Postal Service's website. Therefore, even if EPA were inclined to keep the actual date of service for the triggering of the start of the notice period, which is not warranted and is more onerous than CWA notice under EPA's CWA regulations, EPA could still ensure service of the notice letter and the date of service without requiring that plaintiffs receive the return receipt cards. Online tracking is now ubiquitous with the U.S. Postal Service providing online tracking for all Registered Mail and Certified Mail items. Requiring plaintiffs to provide return receipt cards that routinely fail to make it back to would be plaintiffs, even where receipt is otherwise provable, adds cost to the process and is inefficient, unnecessary, overly burdensome, and interferes with enforcement of RCRA. The only alternative under EPA's current RCRA regulations is personal service, which can present hundreds of dollars in additional costs over mailing per notice letter and comes with its own set of inefficiencies and difficulties, as discussed in part below with regard to EcoRights' experience attempting to serve

EPA officials at controlled-access government facilities. As a result, if EPA keeps the date of receipt trigger for running of the RCRA notice period, it should eliminate the requirement that such date of receipt is proved by reference to return receipt cards.

C. Streamline service by allowing for service of citizen suit notice letters by online portal where state or federal agencies have created such portals.

EcoRights requests that EPA create a provision for online service to state and federal entities through online portals where such portals exist or are created for this purpose. As one example of such a system, for service of citizen suit notice letters under California's Safe Drinking Water and Toxic Enforcement Act ("Proposition 65"), California Health & Safety Code § 25249.7(d), the State of California has created a portal whereby such notices may be served on at least some recipients without the need for mailing at all. Such portals reduce the burden on plaintiffs while also reducing the burden on government agencies from delivery and receipt of such notice letters while also providing for them to automatically be stored in searchable digital formats by the government agencies. These portals can create efficiencies for everyone involved and should be provided for where government entities choose to create and use them.

D. Remove requirements to serve redundant citizen suit notice letter recipients.

EPA's RCRA regulations currently provide for redundant service and service in excess of the RCRA statutory requirements. For example, the RCRA statutory language only requires service on "the Administrator [of EPA]", "the State in which the alleged endangerment may occur", and "any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste..." 42 U.S.C. § 6972(b)(2)(A). Conversely, EPA's RCRA regulations require service on the owner or site manager of the building, plant, installation, or facility alleged to be in violation, if they are a private individual or corporation; the violator's agent for service of process if it is a corporation; the EPA Administrator; the EPA Regional Administrator for the relevant region; and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred. 40 C.F.R. § 254.2(a)(1). This requires service on at least two individuals in the case of corporations that are not required by the statute and that are redundant of other service recipients: (1) the owner or site manager of the building, plant, installation, or facility alleged to be in violation, and (2) the EPA Regional Administrator for the relevant region. The agent for service of process is the legal entity that accepts service of process for the violator, and service on the violator as well, through "the owner or site manager of the building, plant, installation, or facility alleged to be in violation," is redundant. Also, there is no need to serve the Regional Administrator if you have already served the actual EPA Administrator.

While EPA may assume that such redundant service is harmless, in practice it is not. One purpose of having an agent for service of process is so that litigants need not find and serve an individual, which poses a series of problems in many instances that could complicate or preclude service and allows violators to attempt to dodge service to avoid enforcement of RCRA against them, which, under EPA's current RCRA regulations could be accomplished merely by refusing to sign and return the return receipt card. Indeed, EcoRights has multiple times experienced

violators dodging service in just these ways, but it has not experienced agents for service of process dodging service on behalf of their clients. Requiring service on the agent for service of process alone reduces the difficulty of locating and actually successfully serving the appropriate entity. With regard to the Regional Administrator, EcoRights has had extensive difficulty procuring return receipt cards from the EPA Region IX Regional Administrator. This has caused EcoRights to attempt to serve the Regional Administrator multiple times by Registered Mail before ultimately giving up and having to attempt service by personal service, even though online tracking information showed that the Regional Administrator had actually received the notice letter each time. Furthermore, due to work from home policies and limitations posed by EPA on who may accept personal service on behalf of the Regional Administrator, EcoRights had to extensively coordinate with EPA staff and the process servers to find a time where the EPA staff would not be out of the office and during which time the process servers could complete service even where it eventually gave up and decided to use this much more expensive form of service. This was all wasted time and effort, not only because the Regional Administrator had actually received the notice letter by the first Registered Mail mailing in all instances, but because this notice was wholly redundant of notice on the EPA Administrator, *the only EPA official included in the RCRA statute*.¹

VI. EPA'S RESPONSE OBLIGATIONS TO THIS PETITION

EcoRights urges EPA to act on this Petition without delay. The Administrative Procedure Act ("APA") requires an agency to conclude a matter presented to it, such as a legal petition like the one at issue here, "within a reasonable time." 5 U.S.C. § 555(b). While the reasonableness of the time taken by the agency to respond varies depending on the circumstances, where public health is in danger, like here due to interference with RCRA enforcement, a reasonable time will be interpreted to require quick action. *See, e.g., In re Pesticide Action Network N. Am.*, 798 F.3d 809, 814 (9th Cir. 2015). If EPA fails to respond to this Petition "within a reasonable time," EcoRights will file a lawsuit compelling EPA to respond under the APA's grant of a right of judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. "Agency action" is defined to include not just affirmative agency action but also the "failure to act," *id.* § 551(13), such as the failure to respond to a legal petition, such as this. Under the APA, courts "shall compel agency action unlawfully withheld or unreasonably delayed." *id.* § 706(1). While such suit would be proper, it is EcoRights' strong preference that EPA merely undertake this rulemaking and revise its regulations without need of litigation.

¹ While service of notice on individuals, State or local agencies, and Federal Agencies does not require duplicate service on the entities through their agent for service of process, EPA's RCRA regulations currently do require redundant service on the EPA Regional Administrator for the relevant region. EcoRights requests removal of the redundant Regional Administrator service for these categories of violators for the same reasons as for corporations, addressed above.

VII. CONCLUSION

For the reasons provided herein, EcoRights respectfully requests that EPA: (1) require service of citizen suit notice letters on violators by Certified Mail rather than Registered Mail; (2) make clear that the RCRA notice period begins running on the date of mailing, not on the date shown on the return receipt card, or, in the alternative, make clear that confirmation of receipt through online tracking is sufficient to prove the date of receipt; (3) provide that service of a citizen suit notice letter can take place through any online portal created by state or federal agencies, if any, to provide for more efficient administration through the development of future technologies; and (4) limit the entities that must be served with citizen suit notice letters to be coextensive with those required by RCRA itself and to remove redundant recipients. EPA's current RCRA regulations are unduly burdensome and interfere with the administration of RCRA through unreasonable hampering of the citizen suits written into RCRA by Congress as an important means of enforcement. The above proposed changes would improve the enforcement of RCRA by removing impediments to citizen suits, and EPA should promptly undertake a rulemaking to address these issues.

Respectfully submitted

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