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Defeating RCRA Claims Based on Failure to Establish That an Alleged Harm Is "Imminent"

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In the wake of federal and state government budget shortfalls, as well as the BP oil spill in the Gulf of Mexico, strategies for defeating citizen suits under section 7002(a)(1)(B) of the Resource Conservation and Recovery Act of 1976 (RCRA)[1] are more timely than ever. Generally, section 7002(a)(1)(B) provides a cause of action based on an imminent and substantial endangerment to health or the environment, or threat thereof. Specifically, the statute provides that:

> [A]ny person may commence a civil action on his own behalf . . . against any person . . . 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*. . . .[2]

An endangerment to health or the environment or a threat of such an endangerment is alone not enough to prove a claim under this provision. The endangerment or threat must be "imminent." The imminence prong in particular is a hook that can be fatal to a RCRA citizen suit because a plaintiff must prove this and each of the other essential elements within section 7002(a)(1)(B) to prevail.[3] Through a discussion of applicable case law, this article highlights fact patterns where defendants have successfully defeated a RCRA claim based on the imminence requirement and where the presence of contamination was insufficient to establish either imminence or other elements of a RCRA claim.

Discussion

In its Report on Hazardous Waste Disposal, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce[4] stated that it intended that section 7002(a)(1)(B) "be used for events which took place at some time in the past but which continue to present a threat to public health or the environment."[5] This highlights the congressional intent that section 7002(a) serve not to redress the past impact of contamination, but to remedy a matter of greater urgency: ongoing threats to health or the environment. While this legislative history is helpful in defeating claims based on endangerments that are not imminent, there is no additional substantive discussion in the legislative history on the imminence requirement.

The meaning of imminence is fleshed out further in the seminal RCRA case, *Meghrig v. KFC Western, Inc.*[6] In *Meghrig*, defendant KFC Western, Inc. purchased property in Los Angeles that was subsequently discovered to be contaminated with petroleum. The city's Department of Health Services ordered KFC to clean up the property. KFC then sued the prior owners (the Meghrigs) to recover KFC's cleanup costs. The Supreme Court addressed both whether section 7002(a) authorized cost recovery (ruling that it did not) and whether a past endangerment could give rise to a claim under section 7002. Consistent with the limited legislative history, the Court ruled that the RCRA citizen-suit provision provides no relief for wholly past violations because it "was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms, not a remedy that compensates for past cleanup efforts."

Defining "imminent," the Supreme Court ruled that "[a]n endangerment can only be 'imminent' if it 'threatens to occur immediately,' and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger." "There must be a threaat which is present *now*, although the impact of the threat may not be felt until later."[7] The Court's discussion of the imminence requirement has become the standard that lower courts use when determining whether a plaintiff has demonstrated that an endangerment is imminent.[8]

When plaintiffs fail to demonstrate

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that an alleged endangerment is imminent, as defined under *Meghrig*, it is often for one of two reasons: (1) The alleged harm occurred wholly in the past, or (2) the alleged harm is speculative at the time the suit is filed. Moreover, the presence of contamination in itself has been found insufficient to demonstrate the requisite imminence in a number of cases for a variety of reasons.

Wholly Past Harm

The following are examples of factual circumstances that courts have found will not satisfy the imminence requirement because in whole or in part, the endangerment occurred in the past:

- The waste had been remediated and thus did not continue to pose an endangerment to health or the environment at the time the suit was filed. (*Meghrig v. KFC Western, Inc.,* below)
- The contaminants had been remedied if not removed, and remaining contamination no longer posed a risk of harm or had an exposure pathway. (*Price v. U.S. Navy,* below)
- Landfill operations were wholly in the past, and the property was subject to ongoing cleanup under state-agency oversight. (*OSI, Inc. v. U.S.*)

One of the most frequently cited cases addressing the imminence requirement is the Ninth Circuit's decision in *Price v. U.S. Navy*.[9] In *Price*, plaintiff Gloria Price sued defendant U.S. Navy upon learning that her house sat on top of formerly contaminated property used by the navy as a landfill during the 1930s. In 1988, Price undertook remedial work, but in 1989, California's Department of Health Services nevertheless declared that the property presented an "imminent and substantial endangerment to the public health, welfare and the environment." Later in 1989, the state remedied Price's property further, along with three other properties, and subsequent soil tests from one of the yards—not Price's—showed that no contamination remained at that property. Price then filed a lawsuit asserting various claims relating to her property, including one under section 7002(a)(1)(B) of RCRA. At trial, the court granted the Navy's motion to dismiss the RCRA claim, holding that "Price had failed to meet her burden that an 'imminent and substantial endangerment' to health or the environment *presently* exists."[10] On appeal, Price attempted to show that the threatened endangerment was not wholly in the past because the state had not cleaned up the soil located immediately below the foundation of her home and the foundation would need to be replaced, exposing the contamination.

While the Ninth Circuit Court acknowledged that Price might have a legitimate concern about the soil under her home, it rejected the appeal in part on the ground that the endangerment was a past one. The court relied on tests by the state showing that the four properties no longer posed a threat to public health or the environment, and expert-witness testimony showed that the concrete foundation of Price's house provided an effective barrier notwithstanding her alleged future foundation replacement plans.

As often happens in endangerment cases, there were multiple additional factors that influenced the court, including the presence of contamination on neighboring properties coupled with similar debris on Price's property did not, in the court's view, "lead to the logical conclusion that there is contamination under [Price's] residence"; there were no demonstrated hazardous contaminant levels; and "repairs and/or renovations might not cause a release of contaminants."

Speculative Nature of the Alleged Harm

In the following circumstances, courts have found no imminent endangerment or threat where the harm was speculative:

- No "imminent and substantial endangerment" was demonstrated where there was only a possibility that defendants would resume the use of a chemical at some point in the future. (*Crandall v. Denver,* below)
- No imminent endangerment was proven based on groundwater runoff containing road salt where the harm would only occur if plaintiffs were to develop residential housing units on the site. (*Scotchtown Holdings, LLC, v. Goshen,* below)

PRACTITIONERS' TIP:

Be on the lookout for a fact pattern where the property at issue was previously remediated by the plaintiff, especially under government oversight, even if some contamination remains. Absent concrete evidence that the previous contamination still presents a threat to human health or the environment (i.e., that remediation is still necessary), the endangerment may be viewed as wholly past, precluding relief under section 7002(a)(1)(B).

- Contamination resulting from the prior operation of a landfill did not present an "imminent . . . endangerment" where the defendants were already involved in remedying the site and the threat of harm was based on speculative future land uses. (*SSPI-Somersville, Inc. v. TRC Companies,* below)

The Tenth Circuit recently denied a RCRA claim based on the speculative nature of the harm in *Crandall v. Denver*.[11] In *Crandall*, the plaintiffs alleged that aircraft deicing fluid (ADF) endangered human health when used at a particular airport concourse, based on the potential for ADF to produce hydrogen sulfide gas when it decomposes. The court of appeals affirmed the trial court's denial of the RCRA claim on the ground that the plaintiffs failed to demonstrate that ADF presented an imminent and substantial endangerment to health.

The court focused on the fact that the plaintiffs' claim was based on the "possibility of resumption" of full-plane deicing and the use of ADF, and stated that *Meghrig* firmly established that RCRA's citizen-suit provision does not provide

remedies for past contamination that does not currently pose a danger. The court noted that:

> [T]here is a limit to how far the tentativeness of the word *may* can carry a plaintiff. *Meghrig* tells us that an endangerment cannot be merely possible, but must 'threaten [] to occur immediately. . . . Although [other cases] recognize that the harm may not occur for a long time . . . there is no endangerment unless the present or imminent situation can be shown to present a risk of (later) harm.[12]

The court reasoned that "[i]t is not enough under RCRA that in the future someone may do something with solid waste that, absent protective measures, can injure human health."

Similarly, in *Scotchtown Holdings LLC, v. Goshen*,[13] the plaintiff alleged that the defendants' prior and current use of road salt containing sodium chloride for snow removal had contaminated the groundwater, making it unsafe for drinking if Scotchtown Holdings were to develop residential housing units on the site. The court rejected the RCRA claim, finding that the harm was purely speculative. "The purported endangerment to health of future occupants is not actionable under RCRA because, under the plaintiff's own theory, the harm posed by the sodium chloride will never occur. If indeed the groundwater is contaminated, as the plaintiff alleges, it will never be approved for human consumption, as the plaintiff also alleges." The court added that RCRA excludes from regulation waste that "will never present a danger." "Accordingly, courts routinely dismiss RCRA claims where, notwithstanding the existence of hazardous substances in a water supply, the specific factual circumstances at issue prevent humans from actually drinking contaminated water."

PRACTITIONERS' TIP:

The imminence requirement may in certain instances be defeated where the alleged harm is premised on speculative future land use or development, on property or water usage precluded by the contamination, or on the defendant's resumption of a prior activity or use of a toxic substance.

PLAINTIFFS MUST SHOW THAT THE RISK THREATENS TO OCCUR IMMEDIATELY, EVEN THOUGH THE IMPACT MAY NOT OCCUR UNTIL THE FUTURE.

Similar reasoning led to the dismissal of a RCRA claim in *SSPI-Somersville, Inc. v. TRC Companies*.[14] In *SSPI*, the dispute concerned the plaintiffs' allegation that their property had been contaminated by two landfills adjoining their property. There was no question as to whether the landfills were responsible for prior contamination; in 1993, the state's Department of Toxic Substances (DTS) issued a remedial action order that required an investigation of the contamination, and in 1997, the DTS issued a remedial action plan setting forth the cleanup requirements. The remediation began in 2001 pursuant to a consent order that was supervised by DTS. Arguing that the RCRA claim was barred by the ongoing remediation, defendant TRC sought dismissal on summary judgment. The plaintiffs countered that the RCRA claims were not barred because the existing remediation did not take into account "the indoor health risks from groundwater contamination *if the property was developed*, and plaintiffs assert[ed] that the actual remedial work being performed at the landfill site [was] not lessening the vapor intrusion risk."[15]

The court granted the defendants' motion, in substantial part because the alleged harm would only occur if the plaintiffs developed a residential property on the site. Specifically, the court stated that:

> [T]he alleged soil vapor danger only exists *if* plaintiffs develop the property, and all of the evidence submitted by plaintiffs on about [sic] vapor intrusion risks is contingent on development. . . Here, the dangers identified by plaintiffs all depend on future development, and there is no 'imminent and substantial endangerment' that can be remedied by this Court.[16]

Mere Presence of Contamination

A number of courts have ruled that evidence of waste on a site is, by itself, insufficient to satisfy the imminence requirement.[17] Fact patterns leading to dismissal of RCRA claims in whole or part on this basis are diverse:

- Increased phosphorus levels in a lake leading to water-quality violations were insufficient to present an "imminent . . . endangerment." (*Steilacoom Lake Improvement Club, Inc. v. Washington,* below)
- When a site was previously contaminated by substances leaking from a neighboring property that had since been remediated, evidence that chemicals were still present on the property without additional facts demonstrating that the chemicals posed a "current serious threat of harm" was insufficient to establish imminence. (*Leister v. Black & Decker U.S., Inc.,* below)
- When a gas leak from an adjacent property ran underneath the concrete foundation on plaintiff's property, the mere presence of waste created no imminent endangerment absent an "exposure pathway" for the waste to

actually reach the plaintiffs or other potential victims. (*Grace Christian Fellowship v. KJG Investments, Inc.*)

- Lead from shotgun shells did not present an "imminent and substantial endangerment" when the risk to humans and wildlife was unknown and the threatened harm was classified as a "potential exposure risk." (*Cordiano v. Metacon Gun Club, Inc.*)
- The discovery of methane pockets on residential property formerly used as a landfill did not present an "imminent . . . endangerment" to homeowners where the gas was not detected in a confined space (i.e., inside a home) that would create the risk of an explosion. (*Adams v. NVR Homes, Inc.*)
- The plaintiff landowner failed to demonstrate that elevated levels of toluene on its property presented an "imminent . . . endangerment" where it failed to show that a population was at risk because the groundwater had only been classified as a "potential" source of drinking water. (*Newark Group, Inc. v. Dopaco, Inc.*)

Two cases that provide particularly useful examples of contexts in which the presence of contamination alone was insufficient for plaintiffs to meet their burden are *Steilacoom Lake Improvement Club, Inc. v. Washington* and *Leister v. Black & Decker U.S., Inc.*

Steilacoom is a more recent Ninth Circuit decision, notable because the court not only found that the mere presence of waste was insufficient to satisfy the imminence requirement, but also that even waste in excess of applicable regulatory criteria may not be enough to satisfy RCRA section 7002(a)(1)(B).[18] In *Steilacoom*, plaintiff Steilacoom Lake Improvement Club (SLIC) filed a section 7002(a)(1)(B) claim because high amounts of phosphorus in Steilacoom Lake resulted in the excessive growth of weeds and algae and "prevent[ed] the lake from meeting state water quality standards." Although SLIC was able to show that the lake had elevated levels of phosphorus, the court held in favor of the defendants because SLIC "offered no evidence of current dangers caused by the lake's condition, let alone any present dangers that could be termed 'imminent and substantial.'"

Again, the section 7002(a)(1)(B) cases often do not turn on any one factor, and the Ninth Circuit based its decision on several factors, not just the lack of imminence of the harm (though that would have been sufficient).[19] In addition to the lack of harm, the court found that SLIC offered no evidence of what the baseline levels of phosphorus were, making it almost impossible to determine how much, if any, phosphorus was contributed by the defendants; failed to allege the specific activities by the defendants that may have increased the amount of phosphorus in the lake; and failed to create a record as to the contribution of excess phosphorus that was attributable to individual defendants.

In *Leister*, the Fourth Circuit affirmed a decision granting summary judgment in favor of defendant Black & Decker on a RCRA section 7002(a)(1)(B) claim.[20] The plaintiffs' 170-acre dairy farm was located adjacent to a Black & Decker manufacturing and distribution facility, which used "certain hazardous substances, including trichloroethylene (TCE) and tetrachloroethylene (PCE)" on its property between 1952 and 1987. When contamination was discovered in 1984, Black & Decker entered into a consent order with the state environmental agency for the remediation of the property. The court noted that as part of this remediation, Black & Decker successfully treated contamination in the well water, though it was "unclear from the record whether Black & Decker's remedial efforts to remove the hazardous waste from the Property have been successful."

Even with this uncertainty, the court determined that the Leisters failed to prove that "an immediate serious threat of harm [was] present. . . ." Although the Leisters presented evidence that TCE and PCE were still present on Black & Decker's property and their dairy farm, the court stated that "there is simply no evidence in the record—expert or otherwise—to suggest that the presence of these substances poses a current serious threat of harm." The court based its decision in substantial part on a provision in the consent order for water-treatment systems that removed contamination from drinking water from the site. The court ruled that, because there was no evidence to suggest that the presence of the waste found on the property posed a "current, serious threat of harm . . . [i]n the absence of affirmative proof of an immediate serious threat of harm, the [plaintiff's] RCRA claim under § 6972(a)(1)(B) must fail."

PRACTITIONERS' TIP:

When contamination remains on a site, as is typically the case in RCRA lawsuits, consider whether arguments can be made that (1) no exposure pathway remains; (2) there is insufficient evidence tying your client to the contamination and the alleged negative impacts; (3) the harm is speculative, e.g., because there is no evidence contaminated water will be consumed or there is no exposure pathway.

Conclusion

While RCRA provides plaintiffs with a powerful enforcement tool, their obligation to prove that harm or a threat is imminent can provide fruitful defense opportunities. As established by the Supreme Court in *Meghrig* and illustrated in the cases above, at a bare minimum, plaintiffs must demonstrate to a court that the risk of harm threatens to occur immediately, even though the impact of the threat may not occur until the future. Among the ways in which plaintiffs may fail to establish the requisite imminence are by alleging wholly past endangerments or endangerments premised on speculative development plans or uses of toxic chemicals by defendants. Moreover, the mere presence of contamination is insufficient to establish the requisite imminent endangerment or threat, and claims where contamination is present can fail under a variety of factual circumstances.

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Endnotes

1. 42 U.S.C. § 6972(a)(1)(B).

2. *Id.* (emphasis added).

3. All elements of a RCRA § 7002 claim must be proven for a plaintiff to succeed. *See id.*

4. *Report on Hazardous Waste Disposal*, H.R. Comm. Print No. 96-IFC 31, 96th Cong., 1st Sess. 31, 32 (1979) (Eckhardt Report).

5. *Id.*

6. 516 U.S. 479 (1996).

7. *Id.* at 486 (emphasis in original).

8. *See Andritz*, 174 F.R.D. 609, 616–17 (M.D. Penn. 1997); see also Leister v. Black & Decker (U.S.), Inc., 1997 U.S. App. LEXIS 16961, *8–9 (4th Cir. 1997); Steilacoom Lake Improvement Club, Inc. v. Washington, 2005 U.S. App. LEXIS 13703, **10 (9th Cir. 2005).

9. Price v. U.S. Navy, 39 F.3d 1011 (9th Cir. 1994).

10. *Id.* at 1014 (emphasis added).

11. Crandall v. Denver, 594 F.3d 1231 (10th Cir. 2010).

12. *Crandall, supra* note 11 at 1238.

13. 2009 U.S. Dist. LEXIS 1656 (S.D.N.Y. 2009).

14. 2009 U.S. Dist. LEXIS 74464, *56–58 (N.D. Cal. 2009).

15. *Id.* at 51–52 (emphasis in original).

16. *Id.* at 55-56 (emphasis in original).

17. Cordiando v. Metacon Gun Club, Inc., 575 F.3d 199, 214 (2nd Cir. 2009); Adams v. NVR Homes, Inc., 135 F. Supp. 2d 675, 688–89 (D. Md. 2001); Newark Group, Inc. v. Dopaco, Inc., 2010 U.S. Dist. LEXIS 40150, 19–20 (E.D. Cal. 2010); Grace Christian Fellowship v. KJG Investments, Inc., 2009 U.S. Dist. LEXIS 76954, *33–34 (E.D. Wis. 2009).

18. *Steilacoom*, *supra* note 8 at 931–32.

19. The failure to prove any of the required elements is fatal to a claim. *See id*.

20. *Leister*, *supra* note 8 at *1–2.