EFFECTIVE STRATEGIES FOR DEFENDING RCRA CITIZEN SUITS

By: Roy Alan Cohen Esq. and Julius M. Redd, Esq.[1]

There are a number of federal statutes that serve as the basis for pursuing those allegedly responsible for environmental contamination. With the Supreme Court's 2004 curtailment of a party's right to contribution for environmental contamination from liable parties under the Comprehensive Environmental Response, Compensation, and Liability Act[2] and political tension around regulation by government agencies, citizen suits brought under the Resource Conservation and Recovery Act ("RCRA") remain a viable option for plaintiffs. This article highlights numerous tools available to effectively defend against a citizen suit action under RCRA. In particular, this article analyzes how a defendant can use the "imminent and substantial endangerment" element to its advantage in defeating a citizen suit.

Enacted in 1976, RCRA is a comprehensive environmental statute that regulates the disposal, treatment, and storage of hazardous and solid waste.[3] Its primary purpose "is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal" of generated waste in order to reduce its threat on human health and the environment.[4] Section 7002 of RCRA is the "citizen suit" provision, which allows plaintiffs to commence a suit against "any person, including the United States and any other governmental instrumentality or agency, 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."[5] To prevail in a citizen suit action, courts have interpreted this clause as requiring a plaintiff to prove the following elements:

> 1) that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.[6]

Statutory Defenses to a RCRA Citizen Suit

RCRA has numerous defenses built right into the statute. For example, a litigant cannot commence a citizen suit without first giving ninety days' notice to the Environmental Protection Agency ("EPA") Administrator, the State in which the alleged endangerment is located, and the potential defendants.[7] Additionally, if the EPA or the State has already commenced an enforcement action and is diligently pursuing it, a private party cannot initiate a citizen suit for the same endangerment.[8]

Finally, while not specifically provided by the statute, another important defense to be considered by a defendant facing a citizen suit is standing. Often, environmental groups commence citizen suits under RCRA without being able to establish the three basic standing requirements of injury-in-fact, causation, and redressability.[9] Where any of these requirements are lacking, the court will not hesitate to dismiss the action.[10]

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1 Mr. Cohen is a senior trial lawyer with over 33 years of experience and Mr. Redd is an attorney with Porzio, *Bromberg & Newman, P.C., Morristown*, New Jersey, and New York, New York. Both litigate and try a wide variety of product liability, toxic tort, construction, environmental and groundwater contamination, professional liability, premises liability, automotive and trucking, class action, and commercial litigation matters. Mr. Cohen is a past Chair of the IADC's Toxic and Hazardous Substances Committee and TIPS Commercial Transportation Litigation Committee, Self Insurers and Risk Managers Committee, and Products, General Liability & Consumer Law Committee.

2 *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157 (2004)

3 42 U.S.C. § 6901, et seq.

4 *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

5 42 U.S.C. § 6972(a)(1)(B).

6 *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir. 2005) (quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1014-15 (11th Cir. 2004)).

7 42 U.S.C. § 6972(b)(2)(A).

8 42 U.S.C. § 6972(b)(2)(B)-(C); *see McGregor v. Industrial Excess Landfill, Inc.*, 709 F. Supp. 1401 (N.D. Oh. 1987).

9 *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-10 (1998).

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Some Effective "Imminent and Substantial Endangerment" Defenses

Defendants facing a RCRA citizen suit will be well-served to avail themselves of defenses stemming from the "solid or hazardous waste may present an imminent and substantial endangerment" element. These defenses are powerful because they can often be successfully employed at relatively early stages of the litigation.

Although RCRA does not define the operative terms, judicial opinions provide much guidance on the meaning of these words as used in the statute. In the seminal case of *Meghrig v. KFC Western, Inc.*, the Supreme Court defined "imminent" as follows: "[a]n endangerment can only be 'imminent' if it 'threaten[s] to occur immediately' and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such danger."[11] The Court continued that this language of the statute "'implies that there must be a threat which is present now, although the impact of the threat may not be felt until later.'"[12]

Courts have interpreted the term "endangerment" as "a threatened or potential harm," which does not necessarily require proof of actual harm.[13] Finally, courts will find an endangerment "substantial" if it poses a serious threat of harm to the plaintiff's health or the environment.[14] The interplay of these operative terms allows a court to find this element satisfied if a plaintiff proves that "there is a reasonable cause for concern that someone or [the environment] may be exposed to a risk of [serious] harm by release, or threatened release, of hazardous substances in the event remedial action is not taken."[15]

1. Defense Presented When the Risk of Harm is Demonstrably Low

Defendants can extricate themselves from citizen suits by demonstrating that plaintiff's allegations only show a low risk of harm from the alleged endangerment the waste poses. In *Price v. U.S. Navy*, a pivotal case that is frequently relied upon by defendants to defeat citizen suits, the Ninth Circuit determined that the presence of contaminants on a property adjacent to plaintiff's property presented a low risk of harm.[16] Plaintiff's house, and several neighboring properties, was located on top of a former Navy junkyard that was previously used to dump waste containing lead, copper, zinc, and asbestos. After the contamination was discovered, the state successfully remediated the site, including remediating plaintiff's property in such a way that eliminated the only possible pathway of exposure to contaminated soil under her house. Nevertheless, plaintiff commenced a citizen suit alleging that due foundation problems with her home, she would need to excavate the contaminated soil under her home to fix the problems, thereby potentially endangering her and her family.[17] In affirming the district court's grant of defendant's summary judgment motion, the Ninth Circuit found that there was a low risk of harm because plaintiff failed to show that there was "a hazardous level of contamination under her foundation" as the soil under her house was not tested.[18] Additionally, the testing of soil found in the cracks of her foundation did not reveal any contamination, thereby failing to meet the imminent and substantial endangerment element.

Defendants were similarly successful in obtaining summary judgment on plaintiffs' RCRA citizen suit claim in *Adams v. NVR Homes, Inc*.[19] There, plaintiffs were purchasers of homes in a subdivision that was located on a former sand and gravel mine. During the mine's operation, hazardous waste was dumped on various portions of the site.[20] The mine ceased operations in the

10 *Id.*
11 *Meghrig*, supra note 3 at 485-86.
12 *Id.* at 486 (emphasis in original).
13 *Parker v. Scrap Metal Processors, Inc.* 386 F.3d 993, 1015 (10th Cir. 2004).
14 *Id.* (citing *Cox v. City of Dallas*, 256 F.3d 281, 300 (5th Cir. 2001)).
15 *Burlington Northern & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007).
16 *Price v. U.S. Navy*, 39 F.3d 1011, 1013, 1019-20 (9th Cir. 1994).
17 *Id.* at 1018.
18 *Id.* at 1021.
19 135 F. Supp. 2d 675.
20 *Id.* at 681.

early 1970's and was thereafter sold. The purchasers began reclaiming the site with fill material and by the late 1980's, it had been filled completely and capped with topsoil.[21] The property was eventually sold to a property developer who had the site examined by an environmental consulting firm, which concluded that the "site did not contain any hazardous materials or environmental contamination."[22] The developer thereafter sold numerous lots on the site to defendant NVR Homes, Inc. ("NVR Homes"), one of several defendants in the case.

In 1996, NVR Homes began constructing homes on various lots it had purchased in the site, which became known as the Calvert Ridge subdivision. On September 2, 1998, three houses in the subdivision, none of which was involved in the case, were evacuated after elevated levels of methane gas were detected in each house.[23] Immediately thereafter, NVR Homes installed natural gas detectors and a passive ventilation system in the houses it was constructing. each of the house. Additionally, NVR Homes retained two engineering firms and several independent experts to discern the source of the methane problem at Calvert Ridge.[24] It was determined that the fill below one of the lots in the subdivision (a lot that was not involved in the case) was the primarily source of the methane generation.[25] The lot was thereafter excavated and remediated with clean fill.

The plaintiffs in *Adams* were seventeen families who bought homes in the Calvert Ridge subdivision. After the September 2nd incident, methane levels at plaintiffs' homes were tested on more than 175 occasions, resulting in negative results on every occasion with the exception of one instance.[26] Additionally, plaintiffs' natural gas detectors alarmed dozens of times and elevated methane levels were detected in the yards of certain homes. Most of these alarms, however, were due to identifiable sources unrelated to the methane gas.[27]

In *Adams*, plaintiffs alleged that, *inter alia*, the decomposing material used to fill the sand and gravel mine generated elevated levels of methane gas that could potentially cause fires and explosions in their homes and yards.[28] In granting defendants' summary judgment motion, the court determined that explosive levels of methane gas were never detected inside any of the plaintiffs' homes in the 175 tests that were conducted.[29] The court also found that on the few occasions that explosive levels of methane gas were found in the plaintiffs' yard, no substantial harm was demonstrated because methane gas must be in a confined space with an ignition source in order to pose a threat of explosion. Accordingly, the court concluded that the contamination posed a low risk of harm and granted defendants' summary judgment motion.[30]

Where the plaintiff can only prove a low risk of harm, like in *Price* and *Adams*, defendants have a strong argument that the imminent and substantial endangerment standard element cannot be satisfied.

2. Defense Against Contamination in Excess of State Regulatory Levels

While a plaintiff may argue that contamination above a state threshold governing hazardous waste establishes the imminent and substantial endangerment element; defendants can successfully seek summary judgment. In fact, defendants often defeat RCRA citizen suits at the summary judgment stage even though contamination is in excess of a state regulatory level.

The Third Circuit discussed at length the applicability of state regulatory levels to citizen suits in *Interfaith Community Organization v. Honeywell International, Inc*.[31] In Interfaith, when a RCRA citizen suit was in the district court, the court required the plaintiff to prove that the contamination complained of was in excess of state regulatory guidelines. On appeal to the Third Circuit, although it observed that if an error is made in applying the substantial endangerment standard, the error should be made "in favor of protecting public health, welfare and the environment[,]" the court nevertheless

21 *Id.*

22 *Id.* at 682.

23 *Adams*, supra note 18 at 684. While not toxic or poisonous, methane gas can explode when atmospheric levels of it reach at least 5% and the gas is "mixed with oxygen in a confined spaced and ignited by a spark." High concentrations of methane gas can also lead to asphyxiation. *Id.* at n.6.

24 *Id.*

25 *Id.*

26 *Id.* at 684.

27 *Id.* at 688.

28 *Adams*, supra note 18 at 688-89.

29 *Id.* at 688.

30 *Id.* at 689. The same conclusion was reached in *Sierra Club v. Gates*, 2008 U.S. Dist. LEXIS 71860, *107-14 (S.D. Ind. Sept. 22, 2008), where the court determined that a company's manufacture, shipment, and subsequent incineration of a chemical warfare agent presented only a low risk of harm.

31 399 F.3d 248 (3rd Cir. 2005).

determined that the district court erroneously required the plaintiff to prove that the contamination exceeded state levels.[32] In fact, the Third Circuit specifically stated that "substantial endangerment" does not require proof above state thresholds. It also articulated its belief that Congress did not intend citizens suits "to be dependent upon the states in such a manner, and [that] that statutory language [of the provision] provides no support for such dependency."[33] The court concluded that while contamination above state regulatory standards could support citizen suit liability in some cases, requiring a plaintiff to prove contamination above those levels is unjustified. When this analysis is taken further, it is apparent that contamination above such levels is not dispositive proof of the imminent and substantial endangerment element.

Cordiano v. Metacon Gun Club, Inc. illustrates the point well.[34] In *Cordiano*, Metacon operated a private outdoor shooting range. Metacon admitted that, as a result of spent casings and munitions, thousands of pounds of lead were deposited at the shooting range yearly. A State of Connecticut Department of Environmental Protection ("CTDEP") investigation revealed that surface water and groundwater samples from the Metacon site exceeded Connecticut's Remediation Standard Regulation ("RSR").[35] Due to quality control concerns with the sampling, however, CTDEP requested that Metcon retain an expert to conduct another round of sampling. Metacon hired Leggette, Brashears & Graham, Inc. ("LBG") to conduct the requested sampling. Contrary to CTDEP's previous test, LBG found no evidence of lead contamination at the Metcon property.

Thereafter, plaintiffs, who were a group of residents who lived close to the Metacon site, retained their own expert, Advanced Environmental Interface, Inc. ("AEI").[36] Unlike LBG, which had only tested groundwater and surface water, AEI also tested the soil and wetlands sediment in addition to the groundwater and surface water at the Metacon Site. AEI found that the soil was contaminated with lead in excess of CTDEP Direct Exposure Criterion ("DEC") for residential sites, with several samples exceeding the Significant Environmental Hazard notification threshold. AEI also found that the wetlands sediments were contaminated with lead above the DEC and determined that some surface water samples exceeded CTDEP regulatory levels. AEI concluded that the spent ammunition contaminated the Metacon site with lead; however, it advised that a risk assessment would be needed to determine the degree of risk to humans and wildlife.[37]

Plaintiffs thereafter initiated a RCRA citizen suit, among other causes of action, against Metacon and its members and guests. Despite AEI's conclusion that the lead contamination exceeded CTDEP's regulatory standards. Metacon successfully moved for summary judgment in the district court. Citing *Interfaith*, the Second Circuit noted on appeal that "state environmental standards 'do not define a party's federal liability under RCRA.'"[38] The court relied on the fact that the AEI report stated that a risk assessment should be conducted to determine the risk posed to humans and wildlife. It rejected plaintiffs' argument that contamination above CTDEP's limits was dispositive proof of the imminent and substantial endangerment element. Accordingly, the court concluded as follows:

> In sum, the evidence that certain samples taken from the Metacon site exceeded Connecticut's RSR and SEH standards simply provides an inadequate basis for a jury to conclude that federal law, specifically, [the RCRA citizen suit provision], has been violated. Absent additional evidence, the mere fact that [plaintiffs have] produced such samples does not support a reasonable inference that Metacon's site presents an imminent and substantial endangerment.[39]

The *Cordiano* case is by no means an anomaly. The Eastern District of California recently reached the same conclusion in *City of Fresno v. U.S.*[40] There, Fresno's citizen suit was defeated pursuant to defendant's motion on the pleadings although the contamination complained of was in excess of state regulatory levels. Some instances

32 *Id*. at 269.
33 *Id*. at 260.
34 575 F.3d 199 (2nd Cir. 2009).
35 *Id*. at 203.
36 *Id*.
37 *Id*. at 203-04.
38 *Id*. at 212.
39 *Id*. at 214.
40 709 F. Supp. 2d 888 (E.D. Cal. 2010).

of the offending contamination was greater than 100 times the applicable California regulatory threshold. Nevertheless, the court concluded that such evidence alone "does not support a reasonable inference that the contamination presents an imminent and substantial endangerment to health or the environment."[41] Likewise, in 2011, the Western District of New York granted summary judgment to a pesticide formulations company defending a RCRA citizen suit when the contamination at its facility exceeded state regulatory levels.[42] In granting defendant's motion, the court observed that the state regulations plaintiffs relied upon "do not define a party's federal liability under RCRA, nor do they mandate remediation when soil levels are found to exceed the cleanup standards. Without any evidence linking the cited standards to potential imminent and substantial risks to human health or wildlife, reliance on the standards alone presents merely a speculative prospect of future harm, the seriousness of which is equally hypothetical."[43]

In sum, where the sole basis of a citizen suit is contamination above state regulatory levels, defendants have a potent argument that such evidence by itself is insufficient to satisfy the "imminent and substantial endangerment" standard. Indeed, defendants often use this argument to defeat the citizen suit via a summary judgment motion. This argument is particularly strong when the state regulations are non-binding or are risk assessments or thresholds that do not require action or remediation.

Lack of Redressability Defense

Whether certain relief is actually and legally available in citizen suits is another potentially powerful defense. Initially, to state what might be the obvious, if a plaintiff cannot articulate the appropriate relief under RCRA, courts will dismiss the action. To be certain, monetary damages are not permissible in citizen suits. A plaintiff can only seek injunctive relief: "a private citizen suing under [the citizen suit provision] could seek mandatory injunction, *i.e.*, one that orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, *i.e.*, one that 'restrains' a responsible party from further violating RCRA."[44] However, a citizen suit seeking solely money damages, or one where injunctive relief would not benefit plaintiff is not cognizable under RCRA.

In *87 Street Owners Corp. v. Carnegie Hill-87th Street Corp.*, defendant successfully moved for summary judgment after the court determined that injunctive relief would be ineffective.[45] In that case, plaintiff and defendant were neighboring property owners. Plaintiff commenced a RCRA citizen suit alleging that oil contamination emanating from defendant's storage tank presented an imminent and substantial endangerment. When plaintiff commenced its suit, however, the New York Department of Conservation ("NYDEC") was already supervising remediation efforts on defendant's property. With the NYDEC already conducting remediation activities on the site, the court determined that it could not fashion any further injunctive remedy and granted defendant's summary judgment motion:

> Although there are material issues of fact regarding the existence of an imminent and substantial danger within the meaning of RCRA, summary judgment for defendant will nevertheless be granted, because plaintiff has been unable to establish a need for injunctive relief, or even to suggest a form of injunctive relief that could abate whatever environmental danger may be present.[46]

The Western District of Pennsylvania recently reaffirmed this defense in *Trinity Industries v. Chicago Bridge & Iron Co*. The court determined that since defendant had entered into a consent order requiring that it remediate the potentially endangering contamination, injunctive relief was inappropriate: "the court will grant summary judgment in favor of [defendant] because there is no meaningful relief available under RCRA in light of the Consent Order."[47] *Trinity Industries and 87 Street Owners* are important cases because, although both courts found that there were material issues of fact, they nevertheless granted the defendants' summary judgment motions because meaningful injunctive relief could not have been issued in either case.

41 *Id.* at 930.
42 786 F. Supp. 2d 690 (W.D.N.Y. 2011).
43 *Id.* at 710.
44 *Meghrig*, supra note 3 at 486.
45 251 F. Supp. 2d 1215 (S.D.N.Y. 2002).
46 *Id.* at 1217.
47 2012 U.S. Dist. LEXIS 48054, *19 (W.D. Pa. April 4, 2012).

Similarly, the court in *3000 E. Imperial, LLC v. Robertshaw Controls Co.,* granted defendants' summary judgment motion, which successfully argued that since it had already entered into a settlement agreement to remediate the subject property, no relief was available under RCRA.[48] This case is pivotal because a successful plaintiff can generally recoup attorneys' fees under RCRA's fee-shifting provision.[49] Here, however, plaintiff sought an award of attorneys' fees although defendants' summary judgment motion was granted. The court explained that only "prevailing parties" are entitled to a fee award under the statute. Since plaintiff's was not entitled to injunctive relief under its citizen suit, it was not a prevailing party and not entitled to fees.[50] Therefore, plaintiff's citizen suit was defeated on summary judgment and it was not entitled to fees.

CONCLUSION

Plaintiffs pursuing damages for environmental contamination most often utilize the obvious causes of action - strict liability, public and private nuisance, trespass, negligence and other potential common law claims. However, when looking for leverage, plaintiffs more frequently are filing RCRA citizen suits or including RCRA causes of action. Clients and lawyers unfamiliar with defending these kinds of claims need to know that there is a potent arsenal available using some of the weapons outlined in this article. Discovery, preparation and timing, as always, is important, but bringing in defense counsel with experience will more than pay dividends for the defense. ⚖

48 2010 U.S. Dist. LEXIS 138661, *38 (C.D. Ca. December 29, 2010).

49 42 U.S.C. § 6972(e).

50 *3000 E. Imperial, LLC*, supra note 47 at *40.