



Dust In The Wind: Seventh Circuit Opens Door For Citizen Suits Under RCRA

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The Seventh Circuit recently slapped down a decision dismissing a citizen suit for environmental contamination, throwing court doors wide open to private plaintiffs seeking injunctive relief under the Resource Conservation and Recovery Act (RCRA).

With its March 6, 2019, decision in [Liebhart v. SPX Corporation](#), the Seventh Circuit joined eight other circuits in adopting a lenient interpretation of RCRA's requirement that plaintiffs show "imminent and substantial endangerment to health" from contamination. The decision empowers federal courts in Illinois, Indiana and Wisconsin to issue orders "to eliminate the risks posed by toxic waste."

The controversy started with the demolition of a former manufacturing facility located on the same block as three residential properties owned by William and Nancy Liebhart in Watertown, Wisconsin. Prior to 1971, the factory produced power transformers containing Polychlorinated Biphenyls (PCBs), a substance subsequently banned by the EPA. After the factory shut down completely in 2005, SPX commissioned a site study that revealed traces of PCBs throughout the building, most significantly in its concrete floors. Demolition commenced in 2015 under an EPA-approved "self-implementing cleanup plan."

Contending that the demolition was reckless and departed from standard safety procedures, the Liebhart family lodged complaints with the local government and the Wisconsin Department of Natural Resources, and filed a complaint in federal court including a wide range of statutory and common law claims. They supported their contentions with "hundreds of photos and videos" allegedly showing clouds of dust emanating from the demolition site and settling on their property. Tests results confirmed that soil on the Liebhart's

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properties was contaminated with PCBs, but failed to definitively show that the demolition was their source (the court noted that seepage from the factory was just as likely a source as “dust blowing in the wind”). Blood tests revealed the Liebhart themselves to be free of PCBs.

After excluding unreliable test results and expert testimony, the district court granted defendants’ motion for summary judgment. Among other things, the district court held that because plaintiffs failed to demonstrate “an imminent and substantial danger with evidence of health problems they have already suffered,” their claims fell short of the minimum standard for citizen suits under RCRA.

Upon review, the Seventh Circuit accepted the district court’s evidentiary rulings but flatly rejected its interpretation of RCRA, denouncing the “error” of ignoring the standards established by its “sister circuits.” The court made it plain that “imminent and substantial endangerment to health” does not require existing harm, or even threatened irreparable harm.

Instead, the court confirmed that plaintiffs need not meet any minimum quantitative threshold to show imminent and substantial endangerment: “RCRA does not require that plaintiffs demonstrate contamination above some agency-derived level of concentration. . . . It merely requires that they show that contaminants on the property are seriously dangerous to human health (or will be, given prolonged exposure over time).”

The Seventh Circuit joined the [First](#), [Second](#), [Third](#), [Fourth](#), [Fifth](#), [Ninth](#), [Tenth](#) and [Eleventh](#) circuits, interpreting the “unequivocal” language of RCRA “to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate’ the risks posed by toxic waste.”

The court remanded the case, noting that while the lower court “may reach the same conclusions on reconsideration . . . the parties should have another opportunity to litigate whether a substantial and imminent endangerment to health exists.”

Liebhart cements a trend with important implications for managing contaminants. Now that it is sufficient to show that contaminants “will be” a serious danger human health “given prolonged exposure over time” to bring a claim for relief, observing best practices for preventing any potentially harmful exposure to contamination is arguably more important than ever.