



THE ADMINISTRATIVE WATCH

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THIRD CIRCUIT DECISION IS NOT BLANK CHECK FOR RCRA CITIZEN SUITS

The Third Circuit's recent opinion in Interfaith Community Organization v. Honeywell International has received substantial publicity, primarily because it affirmed the trial court's order requiring a \$400 million removal action and because it ruled that the lower court had been *too stringent* in evaluating "imminent and substantial endangerment" under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"). But if you are a company facing a potential RCRA citizen suit, it is important to recognize that the sky is not falling.

The site at issue in ICO v. Honeywell is a former chromate chemical plant in Jersey City, New Jersey. According to the court's opinion, over nearly 60 years about 1.5 million tons of waste from operations by Honeywell's predecessor – containing high levels of hexavalent chromium – were piled on 34 acres adjacent to the Hackensack River. By the 1980s, river contamination from the site was apparent. Following an order by New Jersey Department of Environmental Protection, Honeywell's predecessor installed an interim cap over the 34 acres and reportedly promised a permanent solution. Unhappy with the progress toward a final remedy, a local group in 1995 filed a citizen suit under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

The U.S. District Court for the District of New Jersey in 2003 found that the site constituted an imminent and substantial endangerment to health and the environment and issued an injunction that required Honeywell to excavate and remove about 1.5 million tons of contaminated soil and waste, at an estimated cost of more than \$400 million. The injunction also required Honeywell to remediate contaminated sediments in the river and to further investigate groundwater contamination. 263 F. Supp.2d 796 (D.N.J. 2003). A later opinion awarded plaintiffs \$11 million in attorney fees and litigation costs.

The Third Circuit on February 18, 2005 affirmed the district court's injunctive relief, finding that there was substantial evidence to support the order to require massive excavation. 399 F.3d 248. Further, the appeals court instructed that the district court erred by using a more rigorous standard than is required for determining whether there was an imminent and substantial endangerment. The Third Circuit stated that plaintiffs need not show that human population was at risk, but rather could prevail if there was a serious threat to the environment alone. Additionally, the Third Circuit indicated that an imminent and substantial endangerment could exist regardless whether the levels of contaminants exceeded state standards.

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It would be a mistake, however, to view the Third Circuit decision in ICO v. Honeywell as a blank check for plaintiffs to use a RCRA citizen suit to force removal of all contamination from a site or to prevail where the levels of contaminants are near or below state standards. As the Third Circuit explained in upholding the removal order, injunctive relief under RCRA § 7002(a)(1)(B) must be “reasonably calculated, narrowly tailored and thus necessary to remedy an established wrong.” 399 F.3d at 269. In ICO v. Honeywell, the court found that the interim cap was not working, that Honeywell had committed to NJDEP to undertake a permanent remedy and was dilatory in not doing so, and that less expensive alternative remedies would not be effective due to the unique characteristics of the site and the waste.

Similarly, the Third Circuit’s comments regarding imminent and substantial endangerment should be viewed through the prism of the site at issue. The court found that there was substantial

evidence of actual harm to wildlife and the environment as well as established pathways by which humans were subject to risk; that the chromium was a hazardous waste which was discharging from the site and had contaminated the river; and that the site was widely and heavily polluted, with average levels of contaminants hundreds of times higher than NJDEP standards. It was in response to Honeywell’s argument that NJDEP at the time of trial had not yet established a remedial standard for river sediment chromium that the Third Circuit explained contamination in excess of state standards is not required for an imminent and substantial endangerment. The opinion likewise made clear that a finding of imminent and substantial endangerment is not compelled by levels of contaminants in excess of state standards, and that a pathway of exposure must be established.

In sum, for businesses saddled with contaminated properties, ICO v. Honeywell is a cautionary tale – but not necessarily a horror story.