Citizen Suit Enforcement/RCRA Remediation: Federal Appellate Court Addresses Imminent/Endangerment Question

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

08/31/2021

The United States Court of Appeals for the Seventh Circuit ("7th Circuit") addressed in an August 16th Opinion an issue arising out of a Resource Conservation and Recovery Act ("RCRA") citizen suit action. See *Schmucker v. Johnson Controls, Inc.*, 2021 WL 3616419.

The question involved a facility undergoing remediation and whether it constituted a RCRA imminent and substantial endangerment.

Johnson Controls and a predecessor (collectively "Johnson") operated a manufacturing plant in Goshen, Indiana, that utilized volatile organic compounds ("VOCs"). Some of the VOCs apparently contaminated groundwater under the plant. This resulted in a trichloroethylene ("TCE") groundwater plume.

Johnson is remediating the contamination under the supervision of the Indiana Department of Environmental Management.

Three plaintiffs whose homes are located above the groundwater plume filed a RCRA citizen suit action against Johnson. They argued at trial that Johnson was in violation of 42 U.S.C. § 6972(a)(1)(B). This RCRA provision is one of the two sections in the statute that permits citizen suits:

. . . (B) against any person ... 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[.]

The United States District Court Judge had granted summary judgment to Johnson in regards to the other RCRA citizen suit section because of a finding that there was no violation of "any permit, standard, regulation, condition, requirement, prohibition, or order." 42 U.S.C. § 6972(a)(1)(A) requires that such a violation, etc., be alleged.

The 7th Circuit upheld the District Court's decision.

In considering the issue of whether or not the groundwater plume constituted an imminent and substantial endangerment the 7th Circuit noted certain facts that were undisputed, such as:

- All private wells were closed in the houses connected to city water mains
- Johnson operated a pump and treat procedure to remove TCE and other contaminants
- There has been no sign of TCE in the public water supply

- While TCE did appear in the air over the plume, vapor mitigation had been installed in all houses in vapor mitigation systems
- No houses registered TCE air levels exceeding an IDEM threshold

As to the 6972(a)(1)(A) allegation, the 7th Circuit held the federal District Court ruled correctly because of the plaintiffs' inability to identify a permit, standard, regulation, condition, requirement, prohibition, or order that had been violated. It discounted the plaintiffs' citing of 40 C.F.R. 265.111 (addressing closure) stating that the regulation lacked content. The verbiage referenced is characterized as requiring cleanup just "to the extent necessary" and fails to impose any requirements of its own.

Also discounted was an United States Environmental Protection Agency memorandum from the agency's Acting Director of the Office of Solid Waste requesting that Regional EPA officials use risk-based approaches to develop site-specific clean closure requirements. This document is equated to Department of Justice Antitrust Division Merger Guidelines or Directives to United States Attorneys. In other words, they are characterized as providing helpful information but failed to create enforceable rules.

As to the § 6972(a)(1)(B) count, the 7th Circuit agreed with the federal District Court that the risk from TCE is:

. . . neither "imminent" nor "substantial."

Stated another way the lower court found that the risk from TCE is:

. . . neither around the corner (imminent) nor big (substantial) . . .

The 7th Circuit cites the fact that the plume of water containing TCE is not likely to adversely affect the City of Goshen's drinking water unless it substantially increases the draw and affects the direction of underground flow. This potential result is characterized by the lower court's finding as remote and the low likelihood based on modeling that had been undertaken.

A similar point was made in regards to the potential failure of the vapor mitigation systems. This is characterized as a possible outcome – but one that is insubstantial. Cited are thousands of similar systems installed throughout the nation to control radon with a high level of success.

The 7th Circuit upholds the federal District Court finding that there was no error in concluding on the record that the risks were too slight to compel more action than Johnson is already undertaking with Indiana supervision.

A copy of the Opinion can be downloaded here.