

## Environmental Law & Litigation

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# **Liebhart v. SPX Corporation: Seventh Circuit Adopt Broad Reading of Threshold for RCRA Citizen Suits**

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The U.S. Court of Appeals for the Seventh Circuit recently held that in private actions under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6972(a)(1)(B), plaintiffs need not establish the existence of environmental contamination above an established regulatory standard to be successful. Instead, the Seventh Circuit, relying on established case law from the Third Circuit and the Fourth Circuit, among others, adopted the majority view that it is enough for a private RCRA plaintiff to show the existence of contamination and that the contamination poses an imminent threat to human health or the environment.

### Case Background and Procedural History

William and Nancy Liebhart were the owners of three homes in Watertown, Wisconsin, near the former location of SPX Corporation's transformer facility. Transformers have historically been a source of contamination by polychlorinated biphenyls (PCBs), and they were banned by the Environmental Protection Agency (EPA) in 1979. See 40 CFR Pt. 761. SPX Corporation demolished its facility in 2014, which allegedly caused the release onto the plaintiffs' homes of dust and debris saturated with PCBs. The Liebhartes sued SPX Corporation and its contractors in the United States District Court for the Western District of Wisconsin, pleading a private cause of action under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901, et seq.

In support of the RCRA claim, the Liebhartes' experts cited the mere existence of PCBs in the Liebhartes' homes and opined that there is no safe level of PCBs to which humans may be exposed. The District Court granted summary judgment to the defendants. It held that, under RCRA, the Liebhartes and their experts were required to demonstrate a substantial threat to human health that was supported by not just the existence of PCBs, but the existence of PCBs above a regulatory standard. Because the experts did not opine on that issue, the court excluded their opinions as unreliable. Without expert testimony, the court held that the Liebhartes could not meet their burden of proof and dismissed the RCRA action. The Liebhartes appealed,

and in *Liebhart v. SPX Corporation*, 917 F.3d 952 (7th Cir. 2019), the United States Court of Appeals, Seventh Circuit, reversed. At the heart of the District Court's decision to exclude the expert testimony was its interpretation of the RCRA threshold that the Liebhartes must meet to succeed in a private cause of action. The Seventh Circuit rejected that interpretation.

### The RCRA Private Action

RCRA establishes a comprehensive federal scheme for the regulation of hazardous waste "from cradle to grave." *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328, 331 (1994). Its overarching goal is to reduce the threat that hazardous waste poses to human health and the environment. See *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); see also 42 U.S.C. 6902 (b). While the EPA bears primary responsibility for enforcing RCRA, the statute also confers upon private citizens the ability to enforce its provisions. Specifically, any person may commence a civil action against any other person "who has contributed or who is contributing to the past or present handling, storage, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B).

The phrase "may present an imminent and substantial endangerment" is the primary hurdle that a private litigant must clear in a RCRA cause of action. Some courts have interpreted that phrase to require a "quantitative showing" that contamination has exceeded a regulatory standard. For instance, in *Price v. United States Navy*, 818 F.Supp. 1323 (S.D. Cal. 1992), *aff'd* 39 F.3d 1011 (9th Cir. 1994), the District Court for the Southern District of California required a private RCRA plaintiff to show "the level of contaminants [were] above levels that are considered acceptable by the State." However, that is the minority view. A majority of courts have held that a private RCRA plaintiff is only required to show "a risk of harm" and not "the traditional requirement of threatened irreparable harm." In showing a "risk of harm," the claim is not tied to an exceedance of

a specific standard. Instead, it is tied to the threat that the contamination poses to human health or the environment. *United States v. Price*, 688 F.2d 204, 211 (3rd Cir. 1982); *see also Dague v. City of Burlington*, 935 F.2d 1343 (2nd Cir. 1991), *rev'd in part on other grounds*, 502 U.S. 1071 (1992); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248 (3rd Cir. 2005); *United States v. Waste Indus, Inc.*, 734 F.2d 159, 165 (4th Cir. 1984). This is a case-by-case analysis that might be informed by the exceedance of a regulatory standard, but is not reliant upon it. The legislative history appears to confirm the majority view, as it demonstrates that Congress "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate" the risk of harm from hazardous waste. *Price*, 688 F.2d at 213-14.

## Analysis

In *Liebhart*, the District Court cited none of the established case law discussing the threshold for private RCRA actions. Instead, it relied on a prior Seventh Circuit decision that discussed in passing the EPA's level for acceptable PCB exposure to support its conclusion that the Liebhart's must show PCBs in excess of a regulatory standard. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146 (7th Cir. 1994). The Seventh Circuit rejected this reasoning and formally adopted the majority view. It noted that, for a private cause of action, RCRA adopts a standard of imminence, and "[i]mminence does not require an existing harm, only an ongoing threat of future harm."

*Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 973 (7th Cir. 2002). In evaluating the threat posed by the Liebhart's PCB contamination, there was no requirement to show PCBs above a regulatory standard. It was enough for them to show, through an environmental expert, that PCB contamination exists and, through a forensic toxicologist or the like, that the contamination poses an imminent threat to human health or the environment. The Seventh Circuit thus held that the District Court's exclusion of the expert witnesses using a heightened standard was improper, and it remanded the matter with directions to reconsider the Liebhart's experts in light of the more relaxed standard for RCRA citizen suits.

## Conclusion

In view of *Liebhart* and similar cases, it is apparent that a majority of courts will allow RCRA citizen suits to proceed even if the contamination does not exceed a regulatory standard, if the plaintiff can establish a causal link between that contamination and an imminent threat to public health or the environment.

If you have any questions about the private RCRA action, or any other RCRA issues, please contact any of the attorneys listed.

## Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

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