NOTES

Interfaith Community Organization v. Honeywell International: The Third Circuit Affirms the Citizen Suit Use of the Resource Conservation and Recovery Act and Orders the $400 Million Cleanup of a Polluted Site

I. OVERVIEW OF CASE

Beginning in 1895, the Mutual Chemical Company of America (Mutual) operated a chromate chemical plant in Jersey City, New Jersey.[1] The industrial process in the manufacture of chrome yielded large quantities of a waste residue containing hexavalent chromium, now known to be carcinogenic to humans and toxic to the environment.[2] Mutual dumped this waste at a tidal wetlands site near the Hackensack River in Jersey City.[3] Under normal conditions, hexavalent chromium will degrade to a less toxic form called trivalent; however, the high pH level of Mutual's dumpsite prevented this chemical change from occurring.[4] The site's high pH level facilitated the diffusion of the chromium into the nearby groundwater as well as the Hackensack River.[5] Mutual continued dumping at the site until 1954, when it was succeeded by Allied Corporation, then AlliedSignal, and finally Honeywell.[6] Eventually, the thirty-four-acre site contained 1,500,000 tons of the chromium waste, spread over the site to a depth as much as twenty feet.[7]

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1. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 252 (3d Cir. 2005).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* By comparison, there were 1.8 million tons of debris at the World Trade Center site. Alexander Lane, *Judge Questions Bid To Alter Cleanup Plan*, STAR-LEDGER (Newark, N.J.), Oct. 22, 2005, at 17, *available at* 2005 WLNR 17129951.

The State of New Jersey first attempted to find a permanent remedy for the site as early as 1982, around the same time that green and yellowish-green discharges became visible in the surface water.[8] A year later, a Honeywell official admitted that the site was heavily polluted.[9] Nevertheless, Honeywell did not act until seven years later—two years after being ordered to do so by the New Jersey Department of Environmental Protection (NJDEP).[10] Honeywell paved over half the site with concrete and asphalt and capped the rest with a plastic liner, an admittedly imperfect measure that would last about five years while the company studied a permanent solution.[11]

In 1995, Interfaith Community Organization (ICO) and five individual plaintiffs sued under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA)[12] in the United States District Court for the District of New Jersey.[13] After a bench trial, the district judge found for the plaintiffs and ordered Honeywell to clean up the site by excavating and removing the chromium.[14] On appeal, the United States Court of Appeals for the Third Circuit *held* that RCRA endangerment determinations were questions of fact and not reversible except for clearly erroneous error, that both the individuals and the ICO had standing, that the district court's determination of imminent and substantial endangerment was not clearly erroneous, and that Honeywell would have to clean up the site. *Interfaith Community Organization v. Honeywell International, Inc.*, 399 F.3d 248, 253-54, 257-58, 264, 268 (3d Cir. 2005).

II. BACKGROUND

While the Industrial Revolution brought new material benefits to the country after it began in the late nineteenth century, it also created, and is still creating, large amounts of solid waste.[15] Some of that waste has proven to be especially hazardous to human health and the

8. *Interfaith*, 399 F.3d at 252.
9. *Id.* at 252-53.
10. *Id.* at 253.
11. *Id.*
12. 42 U.S.C. §§ 6901-69992k (2000).
13. *Interfaith*, 399 F.3d at 253.
14. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 263 F. Supp. 2d 796, 802 (D.N.J. 2003).
15. EPA, 530-R-02-016, RCRA ORIENTATION MANUAL I-1 (Jan. 2003), *available at* http://www.epa.gov/epaoswer/general/orientat/r02016.pdf. At the end of World War II, the country was producing approximately 500,000 metric tons of hazardous waste annually; by 1995, that amount had increased more than 500-fold, to an estimated 279 million metric tons per year. *Id.*

environment.[16] Congress passed RCRA in 1976 to "assist the cities, counties and states in the solution of the discarded materials problem and to provide nationwide protection against the dangers of improper hazardous waste disposal."[17] In passing RCRA, Congress "declare[d] it to be the national policy of the United States that, wherever feasible, the generation of the hazardous waste is to be reduced or eliminated as expeditiously as possible."[18] Any hazardous waste that could not be reduced or eliminated was to be "treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment."[19]

RCRA's coverage of solid waste disposal complements the regulation of water discharges controlled by the Clean Water Act (CWA)[20] and the regulation of air emissions covered by the Clean Air Act (CAA).[21] While there is some overlap between RCRA and the Clean Air and Clean Water Acts, the legislative history indicates that Congress "sought to close 'the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes.'"[22] To effectuate that goal, Congress required EPA to administer and enforce the provisions of RCRA and to develop criteria for a national, uniform definition of hazardous waste.[23] States are allowed to administer their own programs as long as they comply with the federal minimum; however, if a state does not have a program that will satisfy the EPA's standards, the Agency has the authority to implement its program in that state.[24]

While RCRA gives broad responsibilities and powers to the EPA to design and enforce restrictions on the disposal of hazardous solid waste, Congress also chose to allow a secondary means of enforcement, namely the citizen suit.[25] Specifically, RCRA allows a private citizen to "commence a civil action on his own behalf against any person . . . who

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16. *Id.*
17. H.R. REP. NO. 94-1491, at 11, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249.
18. RCRA § 1003(b), 42 U.S.C. § 6902(b) (2000).
19. *Id.*
20. 33 U.S.C. §§ 1251-1387 (2000).
21. 42 U.S.C. §§ 7401-7671.
22. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 260 (3d Cir. 2005) (quoting H.R. REP. NO. 94-1491, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241).
23. H.R. REP. NO. 94-1491, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6242.
24. *Id.* at 6242-43. All but two states (Iowa and Alaska) have EPA authorization to administer the base requirements of RCRA. *See* EPA RCRA State Authorization: Data, Charts, and Graphs (STATS), http://www.epa.gov/epaoswer/hazwaste/state/stats/stats_bystate.htm (last visited Jan. 28, 2006).
25. RCRA § 7002, 42 U.S.C. § 6972.

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."[26] For successful plaintiffs, the statute provides for a variety of remedies, including damages and injunctions, making it something like a codification of common law nuisance.[27] In addition, unlike the common law, the statute authorizes costs, including reasonable attorney and expert witness fees, to the "prevailing or substantially prevailing party, whenever the court determines such an award is appropriate."[28]

One of the few explicit restrictions on the citizen suit centers on the prohibition of claims proceeding where the EPA or the state is actively pursuing an action against the same alleged violator.[29] The statute also imposes a sixty-day notice requirement to the EPA, the state, and the alleged violator before commencing an action; however, in cases involving hazardous waste, the plaintiff may immediately proceed upon giving notice.[30] On the other hand, unlike some federal environmental laws such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[31] RCRA lacks a statute of limitations.[32] A plaintiff can bring an action as long as the alleged RCRA violation still exists; therefore, no recovery is possible under RCRA if the cleanup was completed before the action was commenced.[33] While the number of citizens suits filed under RCRA has not risen to the same level as those under the CWA, the statute's broad language, seemingly few restrictions, and its fee-shifting provision make it "attractive to potential plaintiffs."[34]

Notwithstanding the accessibility of RCRA, a plaintiff must still demonstrate standing.[35] Whether the plaintiff is an individual or an association, standing "is a jurisdictional doctrine that the Supreme Court has held must be decided before the merits of a case."[36] The party seeking to invoke federal jurisdiction must demonstrate the three

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26. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (emphasis added).
27. Cox v. City of Dallas, 256 F.3d 281, 291 (5th Cir. 2001) (discussing "actual" rather than "hypothetical" jurisdiction).
28. RCRA § 7002(e), 42 U.S.C. § 6972(e).
29. RCRA § 7002(b)(1)(B), 42 U.S.C. § 6972(b)(1)(B).
30. RCRA § 7002(b)(1)(A), 42 U.S.C. § 6972(b)(1)(A).
31. 42 U.S.C. §§ 9601-9675.
32. Meghrig v. KFC W., 516 U.S. 479, 486 (1996).
33. *Id.* at 488.
34. RCRA PRACTICE MANUAL 437-38 (Theodore Garrett ed., 2d ed. 2004).
35. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 100-02 (1998).
36. Cox v. City of Dallas, 256 F.3d 281, 303 (5th Cir. 2001).

constitutional requirements of standing: (1) injury in fact, (2) causation, and (3) redressability.[37] Additionally, to meet the injury-in-fact requirement, the injury claimed must be "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[38] While section 7002(a)(1)(B) of RCRA uses the language "imminent and substantial endangerment to health *or* the environment," the United States Supreme Court has noted that "[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."[39] For example, the United States Court of Appeals for the Eleventh Circuit recently found that a Georgia plaintiff had more than a "subjective apprehension" from living next to a scrap metal business in which her land had apparently been contaminated by storm water runoff containing solvent, paint waste, and petroleum products from leaking containers on the adjoining scrap metal business's property.[40] EPA testing, as well as testing by the state environmental agency, concluded that "the defendant property presented a likelihood of environmental contamination."[41] While no federal or state environmental report specifically mentioned the plaintiff's property as being contaminated, at trial the plaintiff did supply pieces of solid waste that had migrated from the defendant's property.[42] For the court, the recovered solid waste and the federal and state environmental testing provided enough objective evidence to reject the defendant-appellant's argument that there was no injury in fact.[43]

Of course, not only individuals, but associations and nonprofits interested in environmental issues often allege standing in RCRA claims. An associational plaintiff "may have standing to sue in federal court either based on an injury to the organization in its own right or as the representative of its members who have been harmed."[44] For instance, in a case involving the CWA, the United States Court of Appeals for the Fourth Circuit reversed the district court's dismissal and found injury in fact and associational standing for Friends of the Earth (FOE) and

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37. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

38. *Id.* at 560 (internal quotations omitted).

39. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6792(a)(1)(B) (2000); Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983).

40. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1000-03 (11th Cir. 2004).

41. *Id.* at 1001.

42. *Id.* at 1003.

43. *Id.* While the court did uphold standing under the RCRA claim, it did remand over the damages issue. *Id.* at 1019.

44. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 155 (4th Cir. 2000); Warth v. Seldin, 422 U.S. 490, 511 (1975).

Citizens Local Environmental Action Network (CLEAN).[45] The court based its holding on the sufficiently alleged injuries by members of FOE and CLEAN who either claimed that they suffered property damage or were unable to enjoy a river contaminated by discharges from the defendant's property.[46]

The next requirement of standing, causation, has been defined as the plaintiff's injury being "fairly traceable" to the actions of the alleged violator.[47] Sometimes, causation is easy to show, as in *United States v. Price*, where groundwater in and around a landfill was found to contain some of the contaminants stored above.[48] By its very nature, solid waste is often visible to the naked eye, as with the open garbage dumps in *Cox v. City of Dallas*.[49] The rats and snakes appearing on the residents' adjoining properties could be fairly traceable to the illegal dumps.[50] Likewise, in *Parker v. Scrap Metal Processors, Inc.*, the court had no trouble finding causation due to the solid waste debris that apparently traveled from the defendant's property to the adjoining plaintiff's land.[51]

As to redressabilty, the Supreme Court in *Lujan v. Defenders of Wildlife* rejected the plaintiff's standing claim in part because even if a court found for the plaintiffs, any action taken would likely fail to redress the harm alleged.[52] RCRA specifically lists four broad forms of redress in citizen suits: (1) civil penalties, (2) requiring compliance with RCRA's rules and regulations, (3) injunctions, and (4) "requiring such person to take necessary actions."[53] Courts have interpreted the language of the citizen suit provision of RCRA to mean that Congress "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes."[54] According to the Third Circuit in *Price*, remediation of a plaintiff's case is often made possible because RCRA embraces and expands "courts'

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45. *Gaston Copper*, 204 F.3d at 155.

46. *Id.* at 156-61.

47. Cox v. City of Dallas, 256 F.3d 281, 305 (5th Cir. 2001).

48. United States v. Price, 688 F.2d 204, 209 (3d Cir. 1982). The legislative history makes it clear that Congress did not consider a landfill the same as an "open dump." H.R. REP. NO. 94-1491, at 36-37, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6274-75. An "open dump" is "a land disposal site where discarded materials are deposited with little or no regard for pollution controls or aesthetics." *Id.* at 6275. A sanitary landfill has been planned and designed, but, of course, its operators may not be fully complying with the RCRA. *Id.*

49. *Cox*, 256 F.3d at 284-85.

50. *Id.*

51. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1001, 1003 (11th Cir. 2004).

52. Lujan v. Defenders of Wildlife, 504 U.S. 555, 568-71 (1992).

53. RCRA §§ 3008, 7002(a)(2), 42 U.S.C. §§ 6928, 6972(a)(2) (2000).

54. United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982); RCRA § 7003(b), 42 U.S.C. § 6973(b).

traditional equitable powers by authorizing the issuance of injunctions when there is but a risk of harm, a more lenient standard than the traditional requirement of threatened irreparable harm."[55] If there is a violation of RCRA that can be redressed, courts will have, based on the specific facts of the case, wide latitude to grant whatever relief is necessary to ameliorate the solid waste threat.[56] For instance, in *Cox*, the court found an injunction requiring the dumps to be upgraded or closed would redress the problems created by those dumps.[57] Similarly, the Fourth Circuit in *United States v. Waste Industries, Inc.* found a permanent mandatory injunction to be the appropriate means of redressing leaking toxic waste from a landfill.[58]

Once standing has been established, plaintiffs have been successful on the merits in a number of circuits. This success has been, in part, due to RCRA's language which gives a citizen the right to sue an alleged violator over solid waste that "*may* present an imminent and substantial endangerment to health or the environment."[59] The broad language of RCRA can be traced to the House Committee's conclusion that "[u]nless neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population."[60] Congress might have used the far-reaching "may cause" language in part because it viewed the citizen suit as "an efficient policy instrument and . . . a participatory, democratic mechanism that allows 'concerned citizens' to redress environmental pollution."[61] Because the statute uses such language, the plaintiff does not have to show actual injury, but only "that there is a potential for an imminent threat of serious harm."[62] While the statute is limited by the Supreme Court's explicit standing requirement and the Court's holding that the statute does not apply to solid hazardous waste problems that have been remedied, the use of "may cause" has the function of "prefac[ing] the standard of liability."[63] The

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55. *Price*, 688 F.2d at 211, 214.

56. *Id.* at 214.

57. Cox v. City of Dallas, 256 F.3d 281, 306 (5th Cir. 2001).

58. United States v. Waste Indus., Inc., 734 F.2d 159, 168 (4th Cir. 1984).

59. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

60. H.R. REP. NO. 94-1491, at 6241 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238. The report was prepared by the House Committee on Interstate and Foreign Commerce. *Id.*

61. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 340 (1990). However, the author of that article cynically argued that "citizen suit provisions are an off-budget entitlement program for the environmental movement." *Id.* at 341.

62. Parker v. Scrap Metal Processors, 386 F.3d 993, 1015 (11th Cir. 2004).

63. Lujan v. Defenders of Wildlife, 505 U.S. 555, 560-61 (1992); Meghrig v. KFC W., 516 U.S. 479, 488 (1996); Dague v. City of Burlington, 935 F.2d 1343, 1356 (2d Cir. 1991), *rev'd in part on other grounds*, 502 U.S. 1071 (1992).

word "may" has been called "the operative word in the statute" that leaves open citizen suits involving hazardous sites that are causing, or may cause, "imminent and substantial endangerment."[64] Given that actual harm does not have to be shown, RCRA can be viewed as relatively friendly to citizen suits attempting to address perceived current or future threats from solid hazardous waste sites.[65]

The harm the alleged violator "may cause" must be "imminent and substantial."[66] If a plaintiff successfully establishes standing, it is the "imminent and substantial" requirement that defendants frequently appeal.[67] As the statute did not define the meaning of "imminent," the Supreme Court looked to its plain meaning and determined that the word "implies that there must be a threat which is present *now*, although the impact of the threat may not be felt until later."[68] Congress's inclusion of the word "imminent" means that RCRA plaintiffs need not wait for the harm actually to occur.[69] Rather, present and future threats from hazardous wastes are sufficient to satisfy the imminent requirement of the citizen suit section.[70] RCRA does not require an emergency in order for action to be taken; the danger must only be imminent and substantial.[71] Given that RCRA has no statute of limitations, the use of the word "imminent" gives plaintiffs a great deal of freedom to act on perceived threats from the hazardous waste covered by the statute.[72]

As with "imminent," RCRA did not expressly define "substantial," but the United States Court of Appeals for the Ninth Circuit has held substantial endangerment to be analogous to "serious," a definition quoted by the United States Court of Appeals for the Fifth Circuit in *Cox*.[73] To an extent, certain wastes "by virtue of their composition or longevity are harmful, toxic or lethal."[74] Such wastes "[u]nless neutralized or otherwise properly managed in their disposal, . . . present a clear and present danger to the health and safety of the population and to

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64. *Scrap Metal Processors*, 386 F.3d at 1015.
65. *See, e.g.*, *id.*
66. RCRA § 7002 (a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2000).
67. *See Meghrig*, 516 U.S. at 483-84; *Scrap Metal Processors*, 386 F.3d at 1014-16; Cox v. City of Dallas, 256 F.3d 281, 299-301 (4th Cir. 2001); United States v. Waste Indus., Inc., 734 F.2d 159, 165 (4th Cir. 1984); United States v. Price, 688 F.2d 204, 213-14 (3d Cir. 1982).
68. *Meghrig*, 516 U.S. at 486 (citing Price v. U.S. Navy, 39 F.3d 1011, 1019 (9th Cir. 1994)).
69. *Id.*
70. *Id.*
71. *Waste Indus.*, 734 F.2d at 168.
72. *Meghrig*, 516 U.S. at 486.
73. *Price*, 39 F.3d at 1019; *Cox*, 256 F.3d at 300.
74. H.R. REP. NO. 94-1491, at 3, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241.

the quality of the environment."[75] The legislative history listed several instances of serious public endangerment from across the country that helped spur the passage of RCRA.[76] In New Jersey alone, the House Committee cited instances of public harm that ranged from stockpiled raw materials that forced the closure of public wells to a farm family having to be hospitalized due to exposure to insecticide that leached into the ground water.[77] Thus, waste can be defined as causing substantial endangerment if it limits the ability of citizens to enjoy the environment or puts the health of nearby people at risk.[78]

Limits to the citizen suit provision of RCRA do exist. Some are constitutional, like the Eleventh Amendment's limit on the ability of citizens to sue states in federal court or the standing requirement based on Article III of the Constitution.[79] Others come from the statute itself, such as the prohibition on citizen suits where the EPA or state environmental agency "has commenced and is diligently prosecuting a civil or criminal action."[80] Still others are rooted in court interpretations like the Supreme Court's holding in *Meghrig v. KFC Western, Inc.* that the citizen suit section could not be used to initiate claims on hazardous waste sites that had already been remedied.[81] Notwithstanding those limitations, and any others that may exist, the language "any person may commence a civil action . . . against any person . . . who has contributed or who is contributing to the past or present . . . hazardous waste which may present an imminent and substantial endangerment" has proven to be a powerful tool for citizens pursuing redress against alleged violator of RCRA.[82] Finally, while not all courts agree, multiple courts of appeal have found a conclusion of imminent and substantial endangerment to be a question of fact, and therefore less likely to be disturbed on appeal.[83]

III. THE COURT'S DECISION

In the noted case, the Third Circuit affirmed the bench verdict of the United States District Court for the District of New Jersey ordering

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75. *Id.*
76. *Id.* at 6255-61.
77. *Id.* at 6255-56.
78. *Cox*, 256 F.3d at 299.
79. U.S. CONST. amend. XI; *id.* art. III.
80. RCRA § 7002(b)(1)(B), 42 U.S.C. § 6972(b)(1)(B) (2000).
81. Meghrig v. KFC W. Inc., 516 U.S. 479, 488 (1996).
82. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).
83. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1014-15 (11th Cir. 2004); Cox v. City of Dallas, 386 F.3d 281, 300-01 (5th Cir. 2001); Dague v. City of Burlington, 935 F.2d 1343, 1355-56 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992).

Honeywell International to clean up a thirty-four-acre site in Jersey City heavily contaminated with hexavalent chromium.[84] NJDEP had unsuccessfully attempted to force the property's owners to remedy the site for over twenty years, achieving only a temporary solution that even Honeywell acknowledged as insufficient.[85] A three-judge panel of the Third Circuit unanimously affirmed the remedy ordered by the district court.[86] The court decided that "[e]nough time ha[d] already been spent in the history of this matter and the time for a clean-up ha[d] come," and ordered Honeywell to clean up the site despite its estimated cost of $400 million.[87]

The court first rejected Honeywell's challenges to the standing of both the individual plaintiffs and ICO.[88] As to the standing of the individual plaintiffs, the court relied heavily on the Supreme Court's decision in *Laidlaw* that "courts may not 'raise the standing hurdle higher than the necessary showing for success on the merits in an action.'"[89] Looking at the individual affidavits, the court noted one plaintiff's statements that she would no longer walk along the Hackensack River and her sons would no longer fish in its waters due to the visible pollution in the river.[90] Another plaintiff averred that she lived less than a quarter-mile from the site and feared for the health of her husband and children from their exposure to the toxic chromium.[91] The court rejected Honeywell's argument that injury in fact required direct exposure and accordingly that simply being near contamination was not enough.[92] The court found that the individual plaintiffs alleged injury in fact, no longer being able to enjoy the area around the river and fearing health risks from the nearby contaminated site.[93] Causation was obvious as the discharges clearly came from the Honeywell property.[94] Likewise, the court had found redressability; if the contaminants were removed, the plaintiffs could again enjoy the area, and given the nature of the site, no other remedy would work.[95] Finally, the court quickly dismissed Honeywell's

84. Interfaith Cmty. Org. v. Honeywell Int'l Inc., 399 F.3d 248, 252, 268 (2005).
85. *Id.* at 253.
86. *Id.* at 268.
87. *Id.*
88. Id. at 254-58.
89. *Id.* at 255 (quoting Friends of the Earth v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000)).
90. *Id.* at 256.
91. *Id.*
92. *Id.* at 256-57.
93. *Id.*
94. *Id.*
95. *Id.* at 257.

argument that ICO lacked associational standing because the organizations' purpose was "the improvement of the quality of life in Hudson, County, New Jersey, where all the individual plaintiffs lived[d] and the Site is located."[96]

Honeywell next challenged the district court's determination that the site satisfied RCRA's citizen suit provision requiring "imminent and substantial endangerment."[97] Honeywell did acknowledge that, as the successor corporation, it was responsible for the site and that chromium was a solid hazardous waste covered by RCRA; however, the company disputed the conclusion that the discharges in the Hackensack River caused "substantial endangerment."[98] Honeywell based that argument on the fact that New Jersey had not yet established a remedial standard for chromium discharges in river sediment.[99] Without that standard, the company argued, a determination of substantial endangerment could not be made.[100] The appeals court rejected that construction, concluding that "[p]roof of contamination in excess of state standards may support a finding of liability, and may alone suffice for liability in some cases, but its required used is without justification in the statute."[101] While RCRA had been designed to allow states to run their own solid waste programs, as long as they had been approved by the EPA, an affirmative state decision on a particular type of toxic waste was not necessarily required for a determination that a toxin may cause "imminent and substantial endangerment."[102]

Despite its determination that citizen plaintiffs did not necessarily need a state to conclude that a particular level of a pollutant had reached the level of "caus[ing] imminent and substantial endangerment," the court used New Jersey environmental regulations to show the level of toxicity at the site.[103] The court remarked that the district court had determined the chromium levels in multiple areas to be in excess of acceptable levels, such as in the soil, surface water, groundwater, and river sediment.[104] For instance, the river sediment concentrations of chromium were found to be 90 to 400 times the amount allowed by the

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96. *Id.* at 257-58.
97. *Id.* at 258-64; RCRA § 7002 (a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2000).
98. *Interfaith*, 399 F.3d at 258-60.
99. *Id.* at 260.
100. *Id.*
101. *Id.* at 261.
102. *Id.*; RCRA § 4006, 42 U.S.C. § 6946.
103. *Interfaith*, 399 F.3d at 261.
104. *Id.*

proposed remedial New Jersey environmental standards.[105] While Honeywell correctly pointed out that the NJDEP had not finalized river sediment standards for chromium, because the levels were so high, they would likely remain toxic regardless of any changes that might or might not have been made by the NJDEP.[106] The Third Circuit held that the verdict for the plaintiff was "not clearly erroneous," given that RCRA only required a standard of "caus[ing] imminent and substantial endangerment," the NJDEP's conclusion the site posed a risk to humans, and Honeywell's own acknowledgement that the site was contaminated.[107] Given the risk that chromium posed, the court decided that "if an error is to be made in applying the endangerment standard, the error should be made in favor of protecting public health, welfare, and the environment."[108]

Next, Honeywell charged that the district court erred by ordering the excavation and removal of the chromium from the site.[109] The court rejected that argument because NJDEP and Honeywell had already unsuccessfully attempted a temporary solution involving paving over part of the site and capping the remaining portions with a plastic liner.[110] The court described Honeywell's attempts at stopgap solutions as "dilatory tactics" and criticized the NJDEP's "inability to deal effectively" with those tactics"[111] Because the site's high pH level would prevent the chromium from naturally reducing to a less toxic form and an injunction ordering Honeywell to excavate and clean the site would redress the problem, the court likewise held that the district court's conclusions were not clearly erroneous.[112]

Finally, while all three members of the panel agreed on the result, Circuit Judge Ambro did concur in a separate opinion.[113] While it did not affect the outcome, Judge Ambro had reservations about the majority's determination that "imminent and substantial endangerment" were questions of fact that would be subject to review under a clearly

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105. *Id.*

106. *Id.*

107. *Id.* at 263-64. In 1983 a Honeywell official described the Site as "extremely contaminated. . .[and] visible to the naked eye" and added that "there's something terribly not right with the site." *Id.* at 252-53.

108. *Id.* at 259 (quoting United States v. Conservation Chem. Co., 619 F. Supp. 162, 194 (W.D. Mo. 1985)).

109. *Id.* at 264.

110. *Id.* at 262-65.

111. *Id.*

112. *Id.* at 265.

113. *Id.* at 268-71 (Ambro, J., concurring).

erroneous standard.[114] For Judge Ambro, imminent and substantial questions were a mixture of fact and law that might be entitled to a less deferential standard of review.[115] Nevertheless, the Supreme Court held that where the district court is "'better positioned' than the appellate court to decide the issue in question," deference should be given to its determinations.[116] Because questions of fact "predominate the determination of an imminent and substantial endangerment," Judge Ambro agreed that the judgment of the district court should not be disturbed in this case.[117]

IV. ANALYSIS

The Third Circuit's decision in *Interfaith* continues the tendency of courts of appeal to uphold district court determinations that RCRA plaintiffs have standing and that a polluted site "may cause imminent and substantial endangerment."[118] The *Lujan* decision had criticized the "environmental nexus" argument made by the plaintiffs in an attempt to establish standing over alleged threats to wildlife overseas. On the other hand, many of the *Interfaith* plaintiffs literally lived next door to the site, making their claims much more "concrete and particularized" than the *Lujan* plaintiffs.[119] While not being able to walk by a river or fish in its waters might not seem to justify ordering a $400 million cleanup of a contaminated site, showing injury in fact is not the same as proving the merits.[120] As the court pointed out, the Supreme Court held in *Laidlaw* that overcoming the "standing hurdle" should not be as difficult as proving the merits of the claim.[121] The district court, in the best position to determine the fact, weighed the evidence and found that the plaintiffs had standing.[122] Given that the chromium at the site and in the nearby Hackensack River far exceeded all the New Jersey state standards on acceptable levels in the ground, surface water, groundwater, and river sediment, the Third Circuit agreed with the district court that simply

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114. *Id.* at 269 (Ambro, J., concurring).

115. *Id.* at 269-70 (Ambro, J., concurring).

116. *Id.* at 271 (Ambro, J., concurring) (quoting Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991)).

117. *Id.* at 270-71 (Ambro, J., concurring).

118. RCRA § 7002 (a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2000).

119. Lujan v. Defenders of Wildlife, 505 U.S. 535, 566 (1992); *Interfaith*, 399 F.3d at 256.

120. *Lujan*, 505 U.S. at 560; *Interfaith*, 399 F.3d at 256; Lane, *supra* note 7, at 17.

121. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000); *Interfaith*, 399 F.3d at 255.

122. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 263 F. Supp. 2d 796, 802 (D.N.J. 2003).

being near such levels of toxic chromium could pose a risk to human health which could give rise to standing for a RCRA claim.[123]

The court felt no need to go beyond the plain meanings of "imminent" and "substantial" to determine endangerment. In fact, it held that the district court actually used an improperly high standard for "imminent and substantial," by requiring a "potential population at risk" and the contaminant to be "present at levels above that considered acceptable by the state."[124] The Third Circuit instead sharpened it focus on the language of RCRA, looking at a more literal interpretation of the meaning of the statute.[125] Given that the language of RCRA's citizen suit provision requires only that the waste "*may* cause an imminent and substantial endangerment," the court resisted the possible temptation to hold the plaintiffs to a higher standard, considering the estimated $400 million cleanup cost.[126]

The Third Circuit's holding in *Interfaith* has a good deal of support from other courts of appeal. For instance, in *Parker*, the Eleventh Circuit similarly focused on the everyday meaning of "imminent and substantial" and especially the expanding effect the word "may" had on the endangerment standard.[127] Similarly, the Fifth Circuit in *Cox* looked to the plain meaning of "caus[ing] imminent and substantial endangerment" in its decision to allow prospective injunctive relief.[128] In fact, the Third Circuit struggled to find any precedent for a stricter endangerment standard, observing only one case from the Southern District of California that it declined to follow.[129] In short, the *Interfaith* court had adequate support in continuing the focus on the plain meaning of the "imminent and substantial endangerment standard."

Again, on the surface, the Third Circuit's decision to affirm the district court's order for Honeywell to begin an estimated $400 million cleanup might seem excessive given that the plaintiffs never alleged any actual harm from the contaminated site. In addition, Honeywell had been working for over a decade with the NJDEP to remedy the problem.[130] Perhaps that effort prompted Honeywell to ask in its appellate brief, "even if cleaning up hexavalent chromium would be 'better' for humans living near the site 'and for some barnacles and clams

123. *Interfaith*, 399 F.3d at 261.
124. *Id.* at 259 (quoting *Interfaith*, 263 F. Supp. 2d at 838).
125. *Id.*
126. RCRA § 7002, 42 U.S.C. § 6972(a)(1)(B) (2000) (emphasis added).
127. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1015 (11th Cir. 2004).
128. Cox v. City of Dallas, 256 F.3d 281, 299, 307 (5th Cir. 2001).
129. *Interfaith*, 399 F.3d at 260-66; Price v. U.S. Navy, 818 F. Supp. 1323 (S.D. Cal. 1992).
130. *Interfaith*, 399 F.3d at 252-53, 267.

in the Hackensack River . . . is it worthwhile to move over 1,500,000 tons of fill' and replace it with 'over 1,500,000 tons of clean fill?'"[131] According to the court, Honeywell simply "misse[d] the point."[132] The court implied that Honeywell should perhaps have asked whether it would be worthwhile to move over 1,500,000 tons of hazardous waste in close proximity to a human population and replace it with the same amount of fill that did not contain a known carcinogen.[133] The plain language of the statute requires only that the solid hazardous waste "may cause an imminent and substantial endangerment" to humans or the environment; actual harm is not required.[134] Additionally, while Honeywell correctly observed that citizen suits were not to be allowed while the EPA or the state was diligently pursuing the case, the court reasonably concluded that the administrative remedy had failed, as evidenced by the more-than-twenty years of failed cleanup attempts by the NJDEP.[135] The Third Circuit correctly observed that given the dangers of hazardous waste, Congress's intent was to provide citizens a viable mechanism for pursuing polluters.[136] Finally, despite the extremely high cost of the remedy, the Third Circuit, following the decisions of other courts of appeal, made it clear that RCRA put the legislative priority on preventing solid hazardous waste threats to citizens and the environment.[137]

V. CONCLUSION

Given the stated purpose of RCRA to "assist the cities, counties and states in the solution of the discarded materials problem and to provide nationwide protection against the dangers of improper hazardous waste disposal," the *Interfaith* decision should not be surprising. While RCRA had intended to create a federal-state partnership in addressing hazardous wastes, for whatever reasons, the State of New Jersey had failed to effect a remedy for the Jersey City site that even the defendant acknowledged was heavily contaminated with a substance hazardous to humans and the environment.[138] Even a corporation worth approximately $26 billion, one of the thirty companies that form the Dow Jones Industrial Average,

131. *Id.* at 266.
132. *Id.*
133. *Id.*
134. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2000).
135. *See Interfaith*, 399 F.3d at 268.
136. *See id.* at 265-67.
137. *See id.* at 259.
138. RCRA § 1002 (a)(4), 42 U.S.C. § 6901(a)(4); *see* RCRA PRACTICE MANUAL, *supra* note 34, at 443-44.

would likely feel the effects of a $400 million cleanup.[139] Such a company would likely devote a great deal of resources and energy in avoiding such an outlay. Indeed, it seems to have worked in thwarting an administrative solution. Fortunately for the plaintiffs, the Third Circuit reaffirmed the broad scope and power of the citizen suit provision of RCRA and advanced the cleanup of the long-polluted Jersey City site further than the NJDEP and the EPA had managed to do on their own.[140]

Todd Campbell*

139. Honeywell, In the News: Honeywell Third Quarter Sales Up 8% to $6.9 Billion; Earnings Up 28% to 55 Cents Per Share, http://www.honeywell.com/sites/honeywell (last visited Oct. 30, 2005).

140. As of October 2005, the cleanup had not yet begun. Honeywell has hired new lawyers and filed new motions arguing that a partial cleanup will redress the site. Lane, *supra* note 7, at 17. While the district judge has proceeded with skepticism, he is considering whether to entertain Honeywell's new argument. *Id.*

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