Federal Court Determines Low Levels of Carcinogens PCE and TCE Insufficient to Establish Private RCRA Cause of Action Absent Expert Testimony

BY: JOHN J. DiCHELLO, JR.

Further underscoring the importance of expert testimony to support environmental claims, the United States District Court for the District of New Jersey in *Leese v. Lockheed Martin Corp., et al.,* No. 11-5091 (JBS/AMD), 2014 U.S. Dist. LEXIS 110889 (D. N.J. Aug. 12, 2014), held that a plaintiff cannot sustain a private cause of action under the Resource Conservation & Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.,* absent sufficient evidence from which a factfinder could conclude that *the levels of contamination that are actually present on the plaintiff's property pose* "an imminent and substantial endangerment to health or the environment." This is so even if the contaminant at issue is considered to be carcinogenic or otherwise hazardous, or was detected at levels above federal or state action levels.

In *Leese,* the plaintiffs, owners of properties located near a Lockheed Martin research, development, and manufacturing facility, brought an action against Lockheed Martin alleging that the solvents perchloroethylene ("PCE") and trichloroethylene ("TCE") were discharged at the facility and migrated offsite into soil and groundwater beneath the plaintiffs' properties. Both PCE and TCE had been detected on occasion at various concentrations in soil, indoor air, and groundwater samples taken at the plaintiffs' properties. The plaintiffs sought injunctive relief to prevent and remediate the contamination, as well as civil penalties and attorneys' fees, under various federal and state statutes, namely, RCRA, the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.,* the New Jersey Spill Compensation & Control Act ("Spill Act"), N.J.S.A. 58:10-23.11, and the New Jersey Water Pollution Control Act ("WPCA"), N.J.S.A. 58:10A-1, *et seq.*[1]

The plaintiffs offered a wealth of evidence to support their statutory claims, including data reflecting detections of PCE and TCE at their properties; a federal regulation deeming TCE and PCE to be "hazardous waste"; printouts from the U.S. Environmental Protection Agency ("EPA") website describing background exposure levels, reference concentrations, and health hazard information for PCE and TCE; and a "Toxicological Profile for Tetrachloroethylene" by the U.S. Department of Health and Human Services, Public Health Service, Agency for Toxic Substances and Disease Registry ("ATSDR"). The plaintiffs also designated an expert

to offer opinions on the subject of "environmental studies and remediation activities conducted at the Lockheed Martin property and nearby residential properties." *Id.* at *22. In particular, the expert opined that the PCE and TCE released at the Lockheed Martin facility migrated into groundwater beneath the plaintiffs' properties, and that the PCE continues to degrade into TCE, migrate into soil vapor through unsaturated soils, and ultimately migrate into air within the plaintiffs' properties. Critically, while the plaintiffs' expert offered general opinions regarding the possible health of effects of PCE and TCE—for example, the expert stated that, according to ATSDR and EPA, PCE and TCE affect developmental, neurological, and/or respiratory systems and are reasonably anticipated to be human carcinogens—*he did not opine* that PCE and TCE pose a substantial risk of harm to health or the environment *at the precise levels detected at the plaintiffs' properties*.

In granting summary judgment in favor of Lockheed Martin on the RCRA claim,[2] the district court in *Leese* noted that RCRA requires a plaintiff to show that the contamination poses an imminent and substantial risk of harm to health or the environment at the levels detected at the plaintiff's property; the mere detection of a hazardous substance, alone, is insufficient. The court concluded that the plaintiffs did not meet their burden because, despite the volume of evidence submitted, all the evidence, "taken together and with all reasonable inferences drawn in favor of Plaintiffs, is insufficient to establish 'imminent and substantial endangerment.'" *Id.* at *35. The court reasoned that the plaintiffs' lone expert did not offer any opinion about the potential risks to health or the environment from exposure to PCE and TCE at the levels detected at the plaintiffs' properties. Indeed, the expert failed to reference any concentration of PCE or TCE whatsoever in his report, much less the levels at which PCE and TCE are potentially harmful to humans or the environment.

Moreover, the court explained that none of the soil, indoor air, or groundwater samples taken at the plaintiffs' properties between 2008 and 2012 contained concentrations of PCE or TCE at levels exceeding the current New Jersey Department of Environmental Protection ("NJDEP") screening levels—the concentrations at which additional testing and monitoring would be required—and the levels of PCE and TCE at the properties were "several orders of magnitude below the EPA's scientific benchmarks for the threshold of concern for harm to humans." *Id.* at *44. In fact, only 6 of 54 samples taken at the plaintiffs' properties contained PCE or TCE at levels greater than the older, more stringent, NJDEP screening levels. In addition, the levels of PCE and TCE detected at the plaintiffs' properties steadily declined during that time, suggesting that the contamination was going away.

The *Leese* court also rejected the plaintiffs' contention that exposure to PCE and TCE at any level is sufficient to show a substantial risk to health and the environment. To the contrary, according to the court, the relevant scientific benchmarks for PCE and TCE—i.e., the reference concentrations, reference exposure levels, references doses, and screening levels set by regulatory agencies such as EPA and NJDEP as the thresholds of concern for harm to humans—suggest that lower, trace concentrations of PCE and TCE can be tolerated and do not pose a substantial risk of harm to health or the environment. Because the plaintiffs offered "no evidence and no expert testimony that TCE or PCE may pose a substantial risk of harm to health or the environment at levels detected on and around Plaintiffs' properties," the court in *Leese* granted summary judgment for Lockheed Martin on the RCRA claim. *Id.* at *35, 48-49.

Leese does not stand for the proposition that the presence of a contaminant at levels below federal or state action levels could *never* amount to an imminent and substantial threat to health or the environment for purposes of RCRA liability. Indeed, the court in *Leese* expressly cautioned against such a bright-line interpretation, stating:

> In so holding, the Court does not find as a matter of law that TCE and PCE at levels below the NJDEP screening levels could never pose a threat to health or the environment. Similarly, the Court does not hold that concentrations of TCE and PCE below the EPA or other risk level thresholds could never be potentially harmful to health or the environment. Plaintiffs simply have not carried their burden to adduce evidence to permit a reasonable inference that this is so, and the Court is aware of no basis for assuming that the mere presence

> of these low levels of TCE and PCE may pose a risk of substantial and imminent harm, given that the present EPA risk thresholds are set at much higher concentrations before concern for potential health effects is justified.

Id. at *48.

Certainly, however, action levels will serve as useful guideposts to determine whether an imminent and substantial endangerment to health or the environment exists. For example, a plaintiff may be able to satisfy its burden under RCRA if federal or state regulators have established a threshold at which a substance poses a threat to health and, unlike in *Leese*, the plaintiff presents evidence that the substance was detected at the property above that threshold consistently over time and at increasing concentrations. On the other hand, a more difficult case exists where concentrations of a substance are below applicable regulatory action levels and have exhibited a declining pattern.

At bottom, *Leese* is a lesson for plaintiffs that quality, not quantity, is paramount for purposes of establishing a claim under RCRA. Volumes of testing data reflecting the presence of a contaminant at one's property and scientific authority concluding that a contaminant is hazardous to human health are of no consequence unless a plaintiff comes forward with specific, pointed evidence showing that the contaminant is potentially harmful to health or the environment *at the levels that are actually detected at the plaintiff's property*. In most instances, this type of showing must be made through the testimony of an expert, such as a toxicologist, who analyzes the specific concentrations that are present in the context of regulatory thresholds and existing toxicological and scientific literature.

If you would like further information about this case and how it may affect your business, please contact John DiChello or a member of Blank Rome LLP's Environmental Litigation practice group.

1. The plaintiffs also asserted common law claims against Lockheed Martin. In a prior opinion, the court granted partial summary judgment in favor of Lockheed Martin on those claims because the plaintiffs failed to produce adequate evidence of bodily injury (lack of causation) and diminution of property value.

2. The court also granted summary judgment for Lockheed Martin on the Spill Act and the WPCA claims because the plaintiffs failed to provide notice to certain parties before commencing their lawsuit as required by the New Jersey Environmental Rights Act, N.J.S.A. 2A:35A-1, *et seq.*, under and through which the plaintiffs brought their Spill Act and WPCA claims. In addition, the court granted summary judgment for Lockheed Martin on the CERCLA claim because the plaintiffs did not present arguments or evidence to support a claim for response costs incurred before filing suit.

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