

RCRA Cause of Action/Cleanup - Federal District Court Addresses Impact of Sampling Data



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A United States District Court (New Jersey) (“Court”) addressed in a September 17th Memorandum and Order Cross Motions for Summary Judgment involving a Resource Conservation and Recovery Act (“RCRA”) cost recover action. See *Raritan Baykeeper, et al. v. NL Industries, Inc., et al.*, 2019 WL 4740144.

The Court identified the elements for a RCRA cause of action stating that a plaintiff must prove:

1. that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or ... was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility;
2. that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and
3. that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.

The word “imminent” is stated to imply that there must be a threat which is present now – even though the impact of the threat may not be felt until later. Further, “endangerment” is stated to mean a threatened or potential harm, and does not require proof of actual harm.

The plaintiffs and defendants had filed Cross Motions for Summary Judgment in regards to the issue of liability. The parties were stated to be asking the Court to:

... make a determination as to the relevancy and sufficiency of the sampling data sets produced in 2000, 2002, 2008, 2011, and 2017.

The plaintiffs contended that all the data samples indicate that the site contained metal concentrations exceeding the New Jersey regulatory screening guidelines.

Defendants countered that the United States Environmental Protection Agency and New Jersey Department of Environmental Protection agreed that the arsenic cleanup level for river sediments is 100 ppm as opposed to 19 ppm. They further argued that the data sets demonstrate that the metal concentration amounts at the site decreased over time and fell below the federal and New Jersey remediation and cleanup levels for the region.

Plaintiffs argued that “proof of contamination in excess of state standards may support a finding of RCRA liability, and may alone suffice for liability in some cases.”

The Court stated that the facts in this instance did not provide it with a reason as to why a simple exceedance of state standards established RCRA liability. It further noted that this was:

. . . particularly true in light of Defendants' contention that other benchmarks, such as the remediation guidelines set for neighboring Superfund sites, should be taken into consideration.

The Plaintiffs' arguments addressing expert witnesses' cancer risk assessments were deemed to be information requiring the Court to evaluate opinions with doctors' opinions without the benefit of having heard testimony. This was deemed inappropriate at the summary judgment stage.

The Court concluded there was a dispute regarding the evidence linking the New Jersey standards to potential imminent and substantial risk to human health or wildlife which was considered material to the Court's determination regarding Defendants' liability under RCRA.

Both the Plaintiffs' and Defendants' Motions for Summary Judgment were denied.

A copy of the opinion can be downloaded [here](#).