

RCRA Citizen Suit: Federal District Court Addresses Scope of Term "Removal"



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The United States Federal District Court (E.D. Louisiana) ("Court") addressed in a November 5th Order an issue arising out of a federal Resource Conservation and Recovery Act ("RCRA") citizen suit action. See *Residents of Gordon Plaza, Inc., v. Latoya Cantrell and City of New Orleans*, 2020 WL 6503618.

The dispositive issue addressed by the Court was whether the citizen suit action was barred because a responsible party was conducting a removal action.

Certain New Orleans ("NO") residents ("Residents") alleged in a RCRA citizen suit Complaint that they were residents of Gordon Plaza, Inc. ("Gordon Plaza"). Gordon Plaza was constructed over a former New Orleans-operated dump (Agriculture Street Landfill ["ASL"]). They further allege that NO disposed of hazardous chemicals and solid waste at ASL.

NO subsequently developed 47 acres of ASL for residential use in the 1970s and 80s. The residential development is stated to have included Gordon Plaza.

ASL was placed on the Superfund National Priority List in 1994 because of the presence of certain hazardous substances. The United States Environmental Protection Agency ("EPA") undertook certain remedial activities at the site such as:

- Fencing off a portion of ASL
- Removing two feet of soil
- Placement of a permeable geotech-style mat over some contaminated areas
- Covering contaminated areas with approximately one foot of soil

The Residents contended that EPA did not replace soil or install a geotech-style mat on at least nine Gordon Plaza residential properties.

In 2002 EPA announced it would take no further action at ASL.

In 2005 Hurricane Katrina is alleged to have adversely affected ASL in that certain chemical concentrations are stated to have posed a public health hazard to ASL. In addition, the Residents allege that flooding and time have eroded the soil EPA installed.

NO entered into a Consent Decree with EPA in 2008. It required that NO take actions to protect the remedy. This is stated to have included requiring that NO maintain the soil cap at Gordon Plaza and provide for appropriate restrictions on use and excavation of the property.

The Residents filed a Complaint under the citizen suit provision of RCRA on May 15, 2020. See 42 U.S.C. § 6972(a)(1)(B). They asserted that ASL remains contaminated with harmful chemicals which can cause adverse health effects.

Among the motions filed by NO in response included one arguing that the Residents failed to state a claim under Federal Rule of Civil Procedure 12(b)(6).

NO argued that the citizen suit action was barred under 42 U.S.C. § 6972. The statutory language generally provides that no action may be commenced if the EPA:

. . . has obtained a court order (including consent decree). . . pursuant to which a responsible party is diligently conducting a removal action. . . (emphasis added)

Removal is defined as:

. . . the taking of such actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or the environment.

NO argued in support of its Motion that its Consent Decree with EPA required it to perform removal actions on an ongoing basis. It noted in referencing the Consent Decree:

. . . that contaminants have been left in place beneath the geotextile mat under Gordon Plaza.

Further, NO referenced the fact that soil cap could be breached or degraded by the failure to maintain the vegetated cover over the soil cap.

The Consent Decree includes a provision requiring:

. . . proper operation and maintenance practices and institutional controls are required to maintain the integrity of the cap.

Therefore, the Consent Decree is stated to require NO to use its available authorities to:

- Require that landowners mow and otherwise maintain the grass vegetation on their properties
- Undertake necessary maintenance directly
- Maintain and repair the security fence
- Mow vegetation at least twice per year
- Otherwise maintain a state of vegetated cover on property adjacent to Gordon Plaza

The Residents argues that the Consent Decree maintenance-type activities are not removal action. The Court rejects this argument, stating in part:

. . .but this distinction Plaintiff draws – without citation to authority – has no basis in the statute, which defines “removal” actions as those that “prevent, minimize, or mitigate damage to the public health” or “environment.”

In addition, EPA is noted to have indicated in 2018 that the actions undertaken by NO are protective of human health and the environment and will continue to be protective in the future.

As a result, the Court concludes that the Residents fail to allege that NO’s continued actions under the Consent Decree are not “removal actions.” Therefore, the Motion for Failure to State a Claim is granted.

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