

Landfill/RCRA Citizen Suit: U.S. District Court Addresses Affirmative Defense Related to Cessation of Operation



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A United States District Court (E.D. Louisiana) (“Court”) addressed in a March 11th Order an affirmative defense raised in opposition to a Resource Conservation and Recovery Act (“RCRA”) citizen suit enforcement action. See *Residents of Gordon Plaza, Inc. v. Latoya Cantrell, et al.*, 2019 WL 1111620.

The defendants argued that a RCRA action was not permitted because they had ceased operation of the jurisdictional activity (i.e., a landfill).

Residents of Gordon Plaza, Inc. (“Plaintiffs”) filed a RCRA citizen suit action against the Mayor and City of New Orleans (“Defendants”) in regards to a residential development that they occupied. They alleged that this development (“Gordon Plaza”) is located on the former Agriculture Street Landfill (“Landfill”) that the City of New Orleans operated as a dump from 1909-1957 and 1965-1966.

Plaintiffs alleged that the City disposed of hazardous and solid waste at the Landfill.

Plaintiffs further alleged that the City developed the Landfill for residential use in the 1970s and 1980s and marketed homes without indicating they were located on top of the Landfill. The Landfill was subsequently placed in 1994 on the Superfund National Priorities List. They asserted that the United States Environmental Protection Agency’s soil cover on the Landfill was inadequate to prevent residential exposure. In addition, they alleged that Hurricane Katrina further eroded the soil cover and caused contaminated soil to wash out from under homes and contaminated the surrounding area. Various damages are alleged.

The Plaintiffs RCRA action is based on an assertion that the present and past owners of the disposal facility (Landfill) contributed to the handling and disposal of solid and hazardous waste and may present an eminent and substantial endangerment to health or the environment.

One of the affirmative defenses raised by Defendants was a lack of subject matter jurisdiction. Defendants argued the Plaintiffs were not permitted to bring a suit under the RCRA citizen suit provisions because they had ceased operation of the Landfill prior to enactment of the statute.

Plaintiffs responded that the plain language of RCRA authorizes injunctive relief against Defendants based on the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste (emphasis added). They cited a United States Court of Appeals Fifth Circuit case of *Cox v. City of Dallas*. This decision held that RCRA applied retroactively.

Defendants argued that the RCRA citizen suit provisions were not enacted until 1984. The City had not operated the Landfill since 1966. They argued that retroactive application of RCRA is limited to past actors

where endangerment currently exists, and their past action constitutes a continuing violation. Additional defenses that had been plead were cited as they relate to subject matter jurisdiction. As a result, they argued there was a genuine issue of fact as to whether Defendants' past actions present an imminent and substantial endangerment to health or the environment so as to allow for retroactive application of RCRA to Defendants.

The Court held that Defendants' second affirmative defense must be dismissed as a matter of law because RCRA applies retroactively. The previously referenced Cox decision is cited noting that the Fifth Circuit had disagreed with the Defendant City of Dallas' argument "that because its use ended in 1972 and because the RCRA was not enacted until 1976, it cannot be held liable under § 6972(a)(1)(B). As a result, the Fifth Circuit held that this provision clearly applies to both past and present acts, as the adjectives past and present are specifically included.

The Court dismisses Defendant's second defense to the extent it was based upon the legal conclusion that subject matter jurisdiction exists because the RCRA applies retroactively.

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