

Miller v. City of Fort Myers, No. 2:18-cv-195-FtM-38NPM, 2020 WL 60155 (M.D. Fla. Jan. 4, 2020).

Middle District of Florida Rules That Plaintiffs Failed to Prove Imminent and Substantial Danger in Order to Succeed Under a Resource Conservation and Recovery Act Claim

In the 1960's, the City of Fort Myers ("the City") dumped lime sludge contaminated with arsenic into a vacant field. The City continued dumping sludge at the site for a total of 25,000 cubic yards of sludge. The sludge remained in the ground for almost 50 years before the Florida Department of Environmental Protection ("FDEP"), in 2007, began monitoring the site. However, neither the City nor the FDEP took any immediate action to remove the waste.

The plaintiffs, local property owners whose neighborhood developed around the toxic site, threatened to sue the City for its lack of effort to clean up the toxic waste. In response to the potential lawsuit, the City began cleaning the site, and by the summer of 2019, all 30,000 tons of sludge and soil had been completely removed. However, in 2018, the plaintiff's proceeded with filing the lawsuit against the City under the Resource Conservation and Recovery Act ("RCRA"). At the time the lawsuit was filed, there was still toxic waste on the site. The plaintiffs argued that the toxic waste, which was removed by the time the Court issued its opinion, presented an imminent and substantial danger when they sued in 2018. The plaintiffs argued that the toxic waste affected the groundwater, soil, and caused dust to spread from the contaminated area to the surrounding neighborhoods. The defendant argued that the Court must determine imminent and substantial danger by focusing on the current and future state of the waste, not the status when the suit was filed; the defendant also countered all claims regarding groundwater, soil, and dust contamination. The Court reviewed all arguments and granted the City's Motion for Partial Summary Judgment, granting summary judgment for all federal law claims but declining to exercise supplemental jurisdiction for the state law claims.

As an initial matter, the Court determined that "imminent and substantial endangerment" analysis required by the RCRA must be determined during the present and for the future. In other words, the analysis must be done at the time the judge issues her opinion, not at the time the lawsuit was filed. In reaching this decision, the Court cited to a 10th Circuit Court case, *Crandall v. City and County of Denver, Colorado*. *Crandall* dealt with an airport that was sued when travelers and employees breathed in toxic fumes from a plane cleaning fluid. The Court determined that because the airport had stopped using the cleaning fluid and began testing air quality during litigation, there was no imminent or substantial endangerment in the present or in the future.

After determining that the endangerment must be either present or in the future, the Court examined each of the plaintiff's arguments regarding pollution of the groundwater, soil, and spread of dust. First, the Court ruled that there was no danger from the groundwater because (1) there was no evidence of a pathway to expose the local residents to the contaminated groundwater, and (2) the wells that the plaintiff suggested were the source of the

endangerment were either upgradient from the site, free of any arsenic, or used for irrigation (which has a much higher allowable cleanup target level).

Second, the Court determined that the plaintiff was unable to show that soil contamination was linked to the site, and thus ruled in favor of the City for this portion of the argument. While it was undisputed that the soil contained some level of arsenic, the Court stated that “some level of contamination does not automatically signify an imminent and substantial endangerment.” Since the sludge had been completely cleared from the site by the City and testing showed that the top two feet of soil was free from arsenic, the Court ruled that the plaintiffs had not met their burden to show imminent and substantial endangerment.

Third, the Court rejected the plaintiff’s argument that dust had migrated from the site both during and before the removal of the sludge. The Court found that the record contained no evidence supporting this argument and ruled in favor of the City on this argument as well.

The Court also made note that even if it did agree with the plaintiffs that there may be imminent and substantial endangerment, the remedy that the Court would issue was unclear. The FDEP was already overseeing the removal, the sludge was already removed, and continued monthly monitoring was in place. Finally, the Court declined to exercise supplemental jurisdiction to rule on the Florida state law claims, noting that “state courts, not federal courts, should be the final arbiters of state law.”