



# **When the Worlds of Air, Waste & the Courts Collide: Recent Developments in Solid Waste Litigation**

**Michael Mims, Shareholder, Liskow & Lewis**

# Today's solid waste quick hit topics

1. LEQA's bar of citizen suits during active LDEQ compliance proceedings

2. Nuisance threshold for offsite H<sub>2</sub>S exposure

3. Flow control ordinance enforceability

4. Looming PFAS landfill litigation

Jefferson Parish  
Landfill mass tort  
litigation

City of Shreveport  
litigation

# **TOPIC #1**

## **LEQA's bar of citizen suits during active LDEQ compliance proceedings**



# Jefferson Parish Landfill mass tort litigation



**Foul odors in Jefferson Parish have residents asking officials 'Ewwwww....what's that smell?'**



*Updated: Jul. 9, 2018 at 4:08 PM CDT*  
JEFFERSON PARISH, LA (WVUE) - What's that smell? That's the question that residents in parts of Jefferson Parish have been asking for some time. Now, leaders say they're working to find answers. JP Chief Operating Officer Keith Conley says his office has been getting calls from residents living in River Ridge, Harahan and Waggaman.

## Mobile Air Monitoring Lab

Louisiana Department of Environmental Quality

April 27

**2018** River Ridge and Harahan, LA





Ammonia plant

Barge operations

Sewage treatment plant

River Birch Landfill

JP Landfill

dredging operation

Petrochemical storage

Hwy 90 C&D Landfill





# Jefferson Parish Landfill mass tort litigation

**LOCAL**

## **Jefferson officials identify source of landfill odor, landfill engineer resigns**

by: [WGNO Web Desk](#)

Posted: Jul 23, 2018 / 02:12 PM CDT

Updated: Jul 23, 2018 / 05:02 PM CDT



# Jefferson Parish Landfill mass tort litigation

June 2018 – LDEQ compliance order citing violations related to:

- Inadequate daily cover
- Malfunctioning leachate collection system


Directed the Parish to take “all steps necessary to meet and maintain” compliance with its solid waste, water quality, and air quality permits, as well as any applicable state and federal regulations, and to submit a comprehensive plan for repair and maintenance of the leachate collection system.

STATE OF LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY OFFICE OF ENVIRONMENTAL COMPLIANCE	
IN THE MATTER OF	*
JEFFERSON PARISH GOVERNMENT	* ENFORCEMENT TRACKING NO.
JEFFERSON PARISH	*
ALT ID NO. P-0297R1	* SE-C-18-00372
	*
	* AGENCY INTEREST NO.
	*
PROCEEDINGS UNDER THE LOUISIANA	* 6961
ENVIRONMENTAL QUALITY ACT,	*
La. R.S. 30:2001, ET SEQ.	*
<b><u>COMPLIANCE ORDER</u></b>	
The following <b>COMPLIANCE ORDER</b> is issued to the <b>JEFFERSON PARISH GOVERNMENT (RESPONDENT)</b> by the Louisiana Department of Environmental Quality (the Department), under the authority granted by the Louisiana Environmental Quality Act (the Act), La. R.S. 30:2001, et seq., and particularly by La. R.S. 30:2025(C) and 30:2050.2.	

# Jefferson Parish Landfill mass tort litigation

## Jefferson Parish landfill odors cited in three new lawsuits

Drew Broach, NOLA.com | The Times-Picayune

Aug 15, 2018 Updated Jul 11, 2019  1 min to read

20 of 20





# LEQA's Diligent Prosecution Bar

- *Schaumburg v. Parish of Jefferson*
  - Plaintiffs requested an injunction ordering that the Landfill “cease the emissions of noxious odors and substances.”

Judge, we are asking you to monitor. You are well-aware of the relationship between the LDEQ and municipality of the Parish of Jefferson.

They rather see them spend the money on fixing the problem. The problem for the citizen is if they don't get in compliance, who is going to do it? And that's what we are asking you to do, Judge, we are asking you to monitor it. In case there needs to be quick action for a temporary injunction.

There is also concern that the operators of the Landfill, are not being dealt with in a punitive enough manner by the enforcement arm of the LDEQ

# LEQA's Diligent Prosecution Bar

- *Schaumburg v. Parish of Jefferson* – trial court dismissal
  - Trial court denies injunction and dismisses suit based on pending LDEQ compliance proceedings
  - LEQA allows citizen suits, but includes a “Diligent Prosecution Bar”
  - A citizen suit alleging environmental violations may not proceed “against any person while such person, with respect to the same violation is: . . .under any order issued pursuant to this Subtitle to enforce any provision of this Subtitle [i.e., an LDEQ compliance order].”
  - LA. STAT. ANN. § 30:2026(B)(4)(a) (2019).
  - Judge agreed with Defendants that any injunction would risk conflict with LDEQ directives



# LEQA's Diligent Prosecution Bar

- *Schaumburg v. Parish of Jefferson* – court of appeal reinstates lawsuit
  - The Court of Appeal held that LEQA's diligent enforcement bar did not apply because Plaintiff did not explicitly plead that his lawsuit was a “citizen suit” under LEQA, but rather labeled it a “nuisance action.”
  - Louisiana Supreme Court declines to hear the case
  - Case was later stayed on other grounds – avoiding the potential for conflicting permitting and enforcement directives from LDEQ

# LEQA's Diligent Prosecution Bar

- *Schaumburg v. Parish of Jefferson* – key takeaways
  - Permit holders *are* subject to duplicative and potentially conflicting permitting and enforcement directives from LDEQ and the district courts.
  - Even if a citizen suit requests that a permit holder “comply with current laws,” this would nonetheless require the court to independently adjudicate matters that are typically reserved to LDEQ – such as...





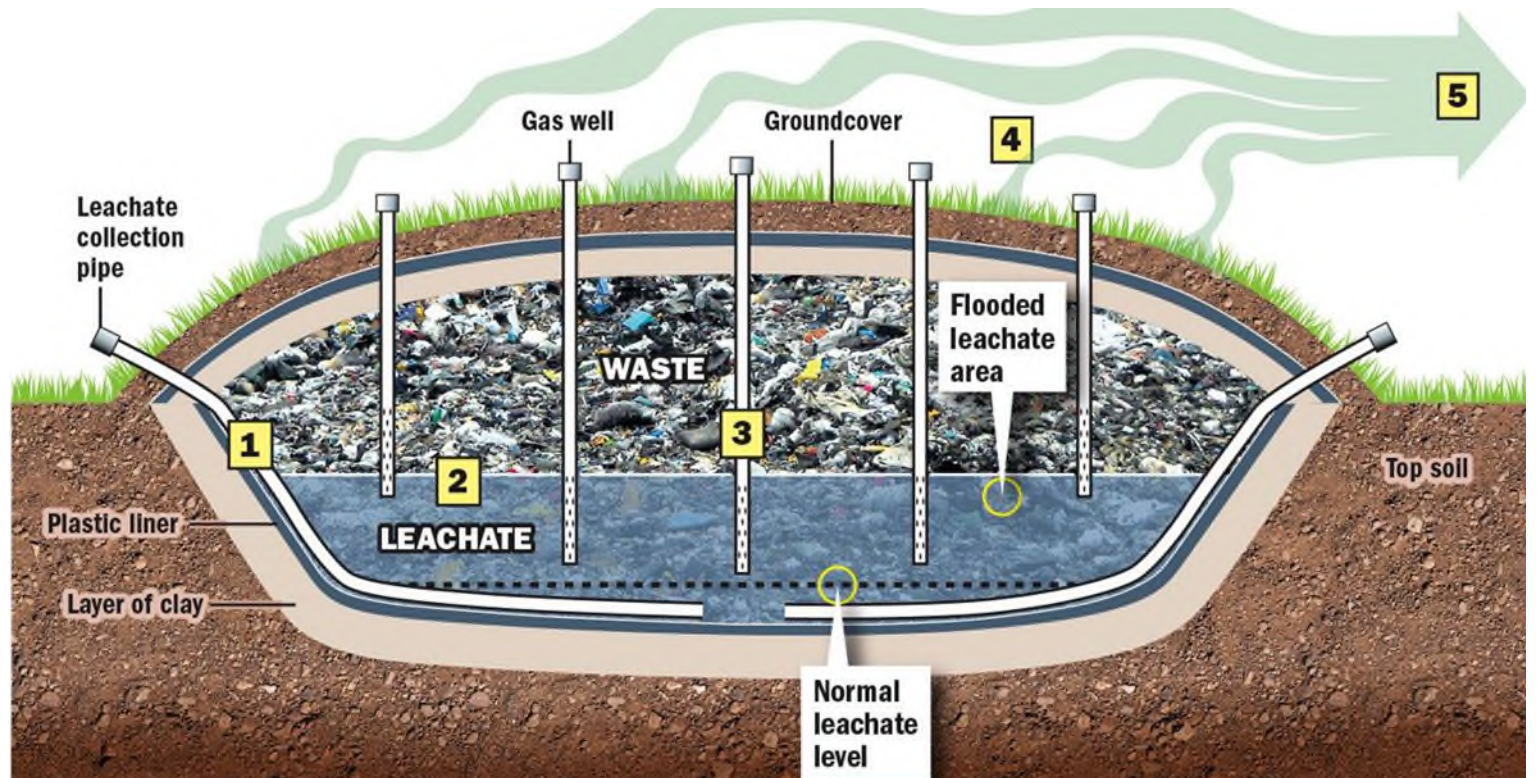
# LEQA's Diligent Prosecution Bar

Which pollution control systems are causing the nuisance (e.g., Leachate control vs. Gas collection vs. Daily cover)?

Which environmental regulations or permit provisions is the permit holder violating?

What corrective actions are necessary to bring the permit holder into compliance?

How to monitor the permit holder's future compliance with any court-ordered injunction?



## **TOPIC #2**

**Offsite H<sub>2</sub>S exposure litigation –  
When does exposure rise to level  
of a nuisance “injury”?**



# JP Landfill litigation – claims for money damages

- ~550 named individual plaintiffs
- ~20,000 plaintiffs in the proposed class action from West Bank (Waggaman, Avondale) and East Bank (River Ridge, Harahan, Kenner)
- Discussion for today: what amount of offsite pollutants (e.g., H<sub>2</sub>S) is enough to cause a nuisance “injury” for which a permit holder may be liable for money damages?
  - Related: is compliance with permit and regulations sufficient to prove that emissions fall short of creating a nuisance?

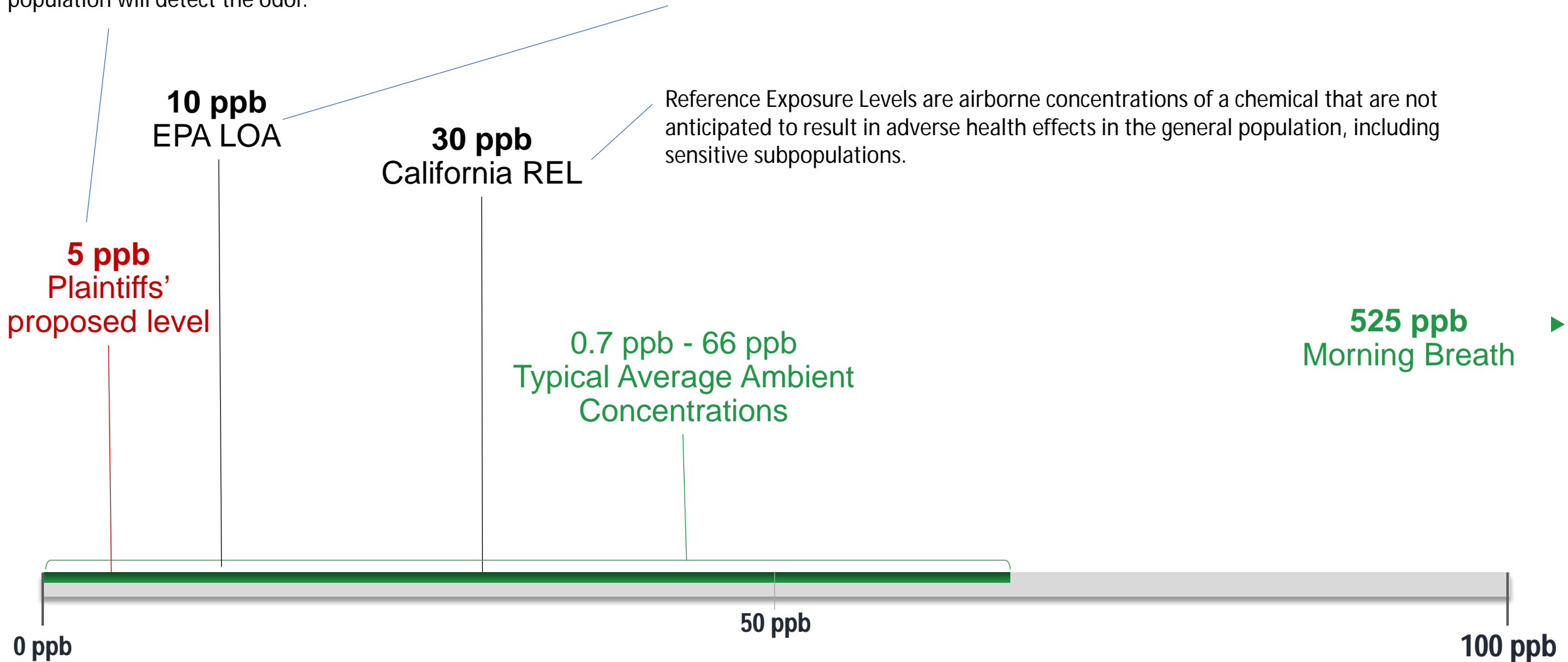


We Don't Get Paid  
**UNTIL YOU  
GET PAID**

# Source for 5 ppb as nuisance threshold

WHO standard for level at which you can expect to start getting complaints -- the level at which 5 percent of the population will detect the odor.

The level of distinct odor awareness (LOA) represents the concentration above which it is predicted that more than half the exposed population will experience at least a distinct odor intensity, and about 10% of the population will experience a strong odor intensity.





# Plaintiffs' Modeling Analysis

## Hydrogen Sulfide Generation:

What is generated inside  
Landfill?

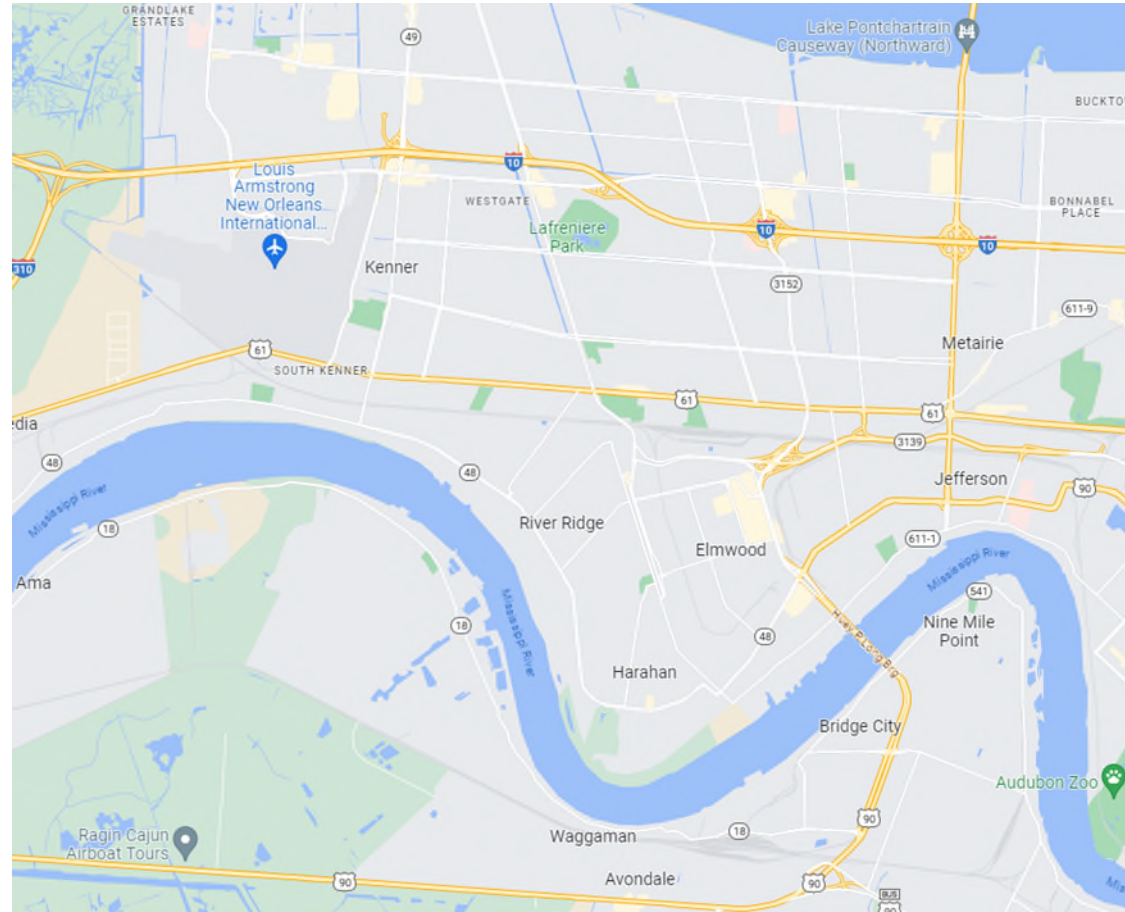
## Emission Rate:

Based on gas collection  
efficiency – anything not  
captured becomes fugitive

## Air Modeling Results:

CALPUFF, 30-minute average  
concentration of 5 ppb of H<sub>2</sub>S

# Where is 5 ppb of H<sub>2</sub>S present?



# JP Landfill mass tort litigation -- takeaways

- Still to be decided:
  - Appeal of 5 ppb standard
  - Were these plaintiffs actually injured or merely inconvenienced?
  - Value of plaintiffs' injuries
  - Can plaintiffs prove JPLF was source?
- Today's takeaway: compliance with permit and regulations is not enough to prevent nuisance litigation
  - Even with full compliance, most sensitive 5% of population may be affected
  - Paramount importance: community relations, PR battle – and obviously, investing in infrastructure



## **TOPIC #3**

# **Enforceability of Flow Control Ordinances in Louisiana**

# Flow Control Ordinances

“A convenient and effective way [for municipalities] to finance their integrated package of waste disposal services.”

*United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346, (2007)

See, e.g., Shreveport Code of Ordinances, Section 74-52:

“All persons required to obtain a [permit to haul solid waste] shall dispose of all solid waste and rubbish collected pursuant to this section, or an equivalent amount as determined by the director of operational services, only at the [city-owned] Woolworth Road Landfill.”



# Flow Control Ordinances

Previously viewed with skepticism due to commerce clause concerns -- *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994)

- Supreme Court struck down a New York flow control ordinance that required disposal of waste in a privately owned landfill
- The Court stated that the ordinance “hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.”

More recently – given new life -- *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346, (2007)

- Supreme Court upheld New York county ordinances forcing private waste management companies to deliver waste to a public landfill
- The flow control ordinance was similar to the one in *Carbone*. The “only salient difference,” according to the Court, was the fact that the solid waste facility to which wastes were directed was “owned and operated by a state created public benefit corporation.”



# Flow Control Ordinances

- Still being litigated -- where is the line between *Carbone* and *United Haulers*?
  - What amount of public benefit is required to pass commerce clause muster?
- For discussion today – what has been the Louisiana experience?
  - *City of Shreveport v. Live Oak et al*, No. 632-922 (filed 2-30-21, Caddo Parish)

# Flow Control Ordinances

- Shreveport ordinance contains an exception: the requirement to dispose at the City landfill “shall not apply to any solid waste and rubbish disposed of outside of the State of Louisiana.”
- Texas Defendant: in 2018, with LDEQ approval, constructs a non-processing transfer station; it offloads all Shreveport waste there; contractor then hauls it to Texas, where disposed of at Defendant’s Texas landfill.



# Flow Control Ordinances

In 2021, the City of Shreveport sues Texas Defendant (and several other haulers) alleging:

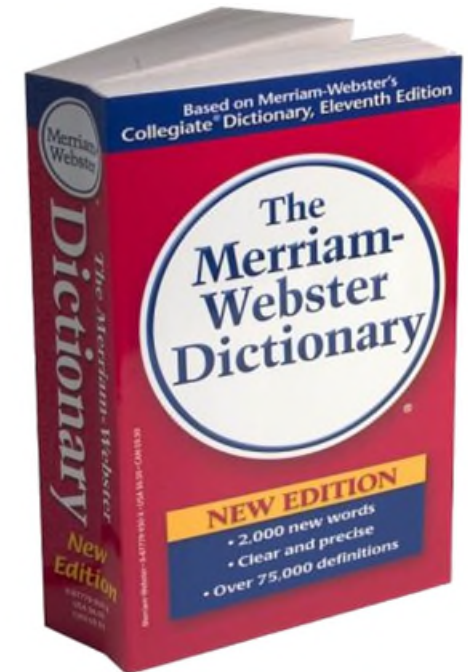
- Violation of flow control ordinance for “disposing” of waste at the transfer station instead of the City Landfill
- Breach of “contract” that required hauler to dispose of waste at the City Landfill
- Seeking \$15 million in lost revenue
- October 2023: trial court dismisses claim against Texas Defendant



# Flow Control Ordinances

## “Disposal” at transfer station

- Shreveport ordinance does not define “disposal”
- City urged Court to adopt Merriam-Webster definition of disposal -- “get rid of”
- Pointed to Texas Defendant’s use of contractor – once it offloaded waste at transfer station, it never touched the waste again
- City: “Waste may be disposed of many times before it reaches its destination. . . The mere fact that the waste is disposed of in one location and then later moved and disposed of at a different location does not change the fact that the waste was disposed of by [Texas Defendant] when it permanently ridded themselves of it.”



# Flow Control Ordinances

- Texas Defendant argued that under LA regulations, “disposal” does not occur at transfer stations
- “Non-Processing Transfer Station,” is defined as a facility used “for the offloading and/or transloading of solid waste destined for disposal.” La. Admin. Code tit. 33, § VII-508(A)(1).
- Under regulations, “disposal” of waste at a “Non-Processing Transfer Station” is explicitly prohibited. La. Admin. Code tit. 33, § VII-508(C).
- Under regulations, “disposal” of waste gives rise to an entirely different set of regulatory obligations. La. Admin Code. tit. 33, Pt VII, § 709 (governing disposal facilities).
- Court agreed with Texas Defendant that temporarily offloading waste at transfer station was not “disposal” – but suggested answer could be different if Shreveport ordinance defined “disposal”



# Flow Control Ordinances

## Breach of “contract” -- what contract?



CITY OF SHREVEPORT  
DEPARTMENT OF PUBLIC WORKS  
SOLID WASTE DIVISION

**PRIVATE HAULERS PERMIT APPLICATION**

**Company Information:**

Name of Company: \_\_\_\_\_  
Address of Company: \_\_\_\_\_  
City, State, Zip: \_\_\_\_\_  
Mailing Address: \_\_\_\_\_  
Contact Person: \_\_\_\_\_ Telephone No.:(\_\_\_\_)

**Vehicle/Body Information:**

Vehicle # or Tag No: \_\_\_\_\_ Permit No: \_\_\_\_\_  
Vehicle Make/Model: \_\_\_\_\_ Body Make/Model: \_\_\_\_\_  
Vehicle VIN: \_\_\_\_\_ Body VIN: \_\_\_\_\_  
Vehicle GVWR: \_\_\_\_\_ Body Rated Capacity: \_\_\_\_\_

**Container Information: (Rolloff, Compactor, Trailer)**

Size: \_\_\_\_\_ Location: \_\_\_\_\_ Permit No. \_\_\_\_\_  
Size: \_\_\_\_\_ Location: \_\_\_\_\_ Permit No. \_\_\_\_\_  
Size: \_\_\_\_\_ Location: \_\_\_\_\_ Permit No. \_\_\_\_\_  
Size: \_\_\_\_\_ Location: \_\_\_\_\_ Permit No. \_\_\_\_\_

Note: If company intends to utilize more than four (4) containers, use additional sheets.

**Sanitary Landfill Information:**

State name and location of landfill where waste is to be disposed of along with facility number: Woolworth Road Regional Solid Waste Facility

**D-017-1909**



# Flow Control Ordinances

- Court held that permit application did not create a contract
- City clerk who signed application did not have authority to enter into contracts on City's behalf
- Case against Texas Defendant dismissed

I DO HEREBY state that the aforementioned information is true and correct to the best of my knowledge. I do understand that if any information is found to be incorrect, that this will be reason for revocation of the permit, if approved. If the equipment, as stated above, hauls any controlled waste, I am attaching a copy of the company's permit, a copy of a manifest, an emergency plan for any spill cleanup, and a statement explaining in detail the type waste being hauled and the acknowledgment that the waste is being hauled and disposed of according to all Federal, State, and/or City Regulations in effect during the term of this permit. I further understand that all vehicles and containers are subject to inspection to ensure that all vehicles and containers are in compliance with all laws and regulations. This permit will be in effect until December 31 of year application was made and must be renewed sixty (60) days prior to end of term.

11-24-2020  
Date  
Jay Rossel, Operations Mgr  
Company Official

\*\*\*\*\*

**FOR OFFICE USE ONLY:**

Approved:  Disapproved:  Reason for disapproval:

AMB

Date Approved: 12-8-2020 Date of Expiration: 12-31-2021

# Flow Control Ordinances

## What's next for Shreveport?

- Claim against one other hauler still pending – unlike Texas Defendant, other hauler admittedly disposing of Shreveport waste at another Louisiana landfill
  - May challenge the constitutionality of ordinance
- Shreveport could amend ordinance to remove out-of-state exception
  - Constitutional? After *United Haulers*, maybe so
- Shreveport could amend ordinance to say that use of transfer station constitutes disposal. Court suggested result could be different if Shreveport ordinance had defined “disposal”
  - Future litigation over whether LA regulations would trump ordinance?

## **TOPIC #4**

# **PFAS litigation against landfill owners and operators**

# PFAS landfill litigation

An advertisement for environmental litigation attorneys. The background is a dark, blue-tinted landscape of mountains and water. At the top center is a white diamond-shaped logo containing a stylized tree. The text is centered and reads: "NEW YORK ENVIRONMENTAL LITIGATION ATTORNEYS". Below this, in a smaller font, is the tagline: "We are ready to do everything in our power to achieve RESULTS for you." At the bottom, there are two white rectangular boxes. The top one contains the text "ENVIRONMENTAL LITIGATION ATTORNEYS" in bold, dark blue letters. The bottom one contains the text "PFAS: A New Frontier for Waste Management and Landfill Leachate" in a dark blue font.



**NEW YORK**  
**ENVIRONMENTAL LITIGATION**  
**ATTORNEYS**

We are ready to do everything in our power to achieve RESULTS for you.

**ENVIRONMENTAL LITIGATION ATTORNEYS**

PFAS: A New Frontier for Waste Management and  
Landfill Leachate



# PFAS landfill litigation

The New York Times

## ***3M Reaches \$10.3 Billion Settlement in 'Forever Chemicals' Suits***

The deal followed an agreement by Chemours, DuPont and Corteva to pay \$1.19 billion to help resolve claims that the chemical manufacturers contaminated drinking water across the country.

 Share full article  



# PFAS landfill litigation

- **June 2022: EPA issues interim updated health advisory concentration for drinking water:**
  - PFOA: 0.004 ppt
  - PFOS: 0.02 ppt
- **Sites' NPDES permits don't yet authorize discharge of PFOA/PFOS/PFAS**
- **Has led to CWA citizen suits for unauthorized discharges**

## Non-profit group files lawsuit against York County landfill, accusing it of violating Clean Water Act regulations

The lawsuit claims Modern Landfill has repeatedly violated the terms of its water quality-based permit and of making unpermitted discharges of PFAs into Kreutz Creek



# PFAS landfill litigation

- *Lower Susquehanna Riverkeeper Association v. Republic Services of Pennsylvania LLC*, 23-cv-00044-JPW (Middle District of Pennsylvania, filed 01/11/23)
- Early stages of discovery

24. Republic has, since at least June 2022, violated Sections 1311(a) and 1365(a)(1)(A) and (f)(1) of the CWA by discharging toxic per- and polyfluoroalkyl substances (PFAS) from Outfall 001 at the Modern Landfill into Kreutz Creek without an NPDES permit authorizing such discharges.

25. Specifically, on June 22, July 15, August 29, and September 30, 2022, LSRA sampled Republic's discharges at and downstream from Outfall 001 at its Modern Landfill and detected extremely high levels of PFAS. For example, on June 22, 2022, perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA), which are types of PFAS, were measured at 374.3 parts per trillion (ppt) and 847 ppt, respectively, and 25 other PFAS compounds were also measured at very high levels.

26. In comparison, in June 2022 EPA issued updated Drinking Water Health Advisories which set the public adverse health effect thresholds for PFOS at 0.02 ppt and PFOA at 0.004 ppt. 87 Fed. Reg. 36848 (June 21, 2022).

# PFAS landfill litigation

- EPA has proposed to designate PFOA and PFOS as hazardous substances under CERCLA – final rule expected in Feb. 2024
- April 2023: EPA issues advance notice of proposed rulemaking – whether to designate seven PFAS compounds (besides PFOA and PFOS) as hazardous substances under CERCLA



## PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024





# PFAS landfill litigation

- Waste industry groups have lobbied for legislation to exempt “passive receivers” such as solid waste facilities
- US S1429, Resource Management PFAS Liability Protection Act of 2023 – currently in committee
- SWANA: “As we work to address PFAS in the environment, it is vital that essential public services and the communities they serve are not unfairly burdened. SWANA supports legislative action to ensure the polluter pays and not ratepayers and the public at-large.”
- NWRA: “We believe a narrow exemption for the municipal solid waste industry serves to keep CERCLA liability on the industries that created the pollution. NWRA appreciates these Senators taking a balanced approach to ensure that landfills will remain the safest method to manage solid waste.”



# THANK YOU

FOR YOUR TIME AND CONSIDERATION

**Michael C. Mims**

Shareholder

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504.556.4143