Updates
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Industrial Landowners May Be Liable for Tenants' Stormwater Discharges

In *California Sportfishing Protection Alliance v. Shiloh Group, LLC*, Case No. 16-CV-06499-DMR, 2017 WL 3136443 (N.D. Cal. Jul. 24, 2017), the United States District Court for the Northern District of California held that the owners of an industrial park may be liable under the Clean Water Act (CWA) for illegal stormwater discharges by their tenants, even if the owners played no role in generating or adding to the discharges.

Legal Background

Section 402 of the CWA prohibits "the discharge of any pollutant" into navigable waters from any "point source" without a permit under the National Pollutant Discharge Elimination System (NPDES). For stormwater discharges, the NPDES permit program in California is administered by the State Water Resources Control Board.

Factual Background

In this dispute, the plaintiff, California Sportfishing Protection Alliance, claimed that the defendant property owners failed to comply with the terms and requirements of a statewide General Permit under which the landowners had obtained coverage for industrial stormwater discharges. The landowners operated and controlled a 31-acre industrial park and leased lots to approximately 60-80 tenant businesses, which in turn conducted industrial activities that discharged polluted stormwater. The case alleged that these discharges exceeded the applicable permit limits and violated the requirement that the landowners implement plans to prevent or reduce the discharges. In denying the landowners' motion to dismiss the case, the court rejected their claim that they could not be held liable as mere passive owners of the property.

The Court's Analysis

The central issue in the case was whether the landowners, who themselves did not engage in any industrial activities and did not generate or add to the pollutant discharge, could be liable under the CWA. Under the standards governing the landowners' motion to dismiss the case, the court was required to accept as true the facts as alleged in the plaintiffs' complaint that the landowners owned, operated and controlled the property as well as the conveyance systems on the property for managing and discharging stormwater. Accordingly, the inquiry, properly framed, was whether a property owner who does not engage in industrial activity itself, but who maintains and controls a property leased to tenants who engage in such activity and use the property's stormwater infrastructure, can be liable under the CWA. The court held that CWA liability does indeed extend to such a property owner.

In its analysis, the court relied on the U.S. Court of Appeals for the Ninth Circuit's broad view of liability under the CWA: "The Clean Water Act does not distinguish between those who add and those who convey what is added by others—the Act is indifferent to the originator of pollution." Nat. Res. Def. Council v. Cnty. of Los Angeles, 673 F.3d 880, 899 (9th Cir. 2011), reversed on other grounds, 568 U.S. 78 (2013). The court also noted that the U.S. Court of Appeals for the Tenth Circuit had reached a similar conclusion.

Extending the Ninth Circuit's general view of the CWA, the court relied on two district court decisions within the Ninth Circuit, holding that a party may be liable under the CWA for unlawful stormwater discharges if it exercises sufficient control over the "facility" responsible for the discharge, even if the party did not create the discharge. *See Puget Soundkeeper All. v. Cruise Terminals of Am., LLC*, 216 F. Supp. 3d 1198, 1223-25 (W.D. Wash. 2015); *Resurrection Bay Conservation All. v. City of Seward*, No. 3:06-cv-0224-RRB, 2008 WL 508499,

at *4-6 (D. Alaska Feb 21, 2008). In this case, the "facility" was the stormwater infrastructure that served the entire property and presumably was used by all tenants.

The court rejected the landowners' attempts to distinguish these two district court cases. The landowners claimed that the cases did not involve owners of private property and that the defendants in those cases exerted much more control over the stormwater facilities than in the present dispute. The court—emphasizing that the key issue was *control* over the property rather than *ownership*—ruled that any argument about the extent of control was premature at the motion to dismiss stage where the court's task was limited to a determination of whether the allegations in the complaint, if true, were sufficient to impose liability under the CWA. The court did not, therefore, provide or identify any standard or test for determining the requisite level of control.

Settlement Agreement

After the court denied their motion to dismiss, the landowners agreed to settle the case. The settlement agreement limits the landowners' ability to enter into leases with tenants who engage in industrial activities; requires the landowners to make structural changes to the stormwater conveyance system at the facility; and requires the landowners to pay the plaintiff, Alliance, $325,000 for mitigation in lieu of civil penalties under the CWA, to defray the Alliance's mitigation monitoring costs, and to reimburse the Alliance for the fees and costs incurred in bringing the action.

Potential Impact of the Decision

While the court did not establish a standard or test for property-owner control that would result in liability, the decision confirms that an owner of an industrial property with multiple tenant businesses may not be able to claim mere passive ownership as a means of avoiding liability under the CWA. The case extends the ruling in *Puget Soundkeeper Alliance,* in which a city was held to have exerted sufficient control over a harbor area where pollutants associated with boat repair were discharged. That court ruling found that the city had the requisite control because it had undertaken activities that included snow removal, constructing and repairing ditches and culverts to facilitate the flow of stormwater, and engaging in various cleanup operations in the harbor.

The court in that case also held that it was the city that had the authority over the entire harbor, not the individuals that contributed to the discharge. Under this reasoning, where a property owner maintains any common infrastructure, provides common services, or retains authority over the whole property, the owner must consider potential liability for any unlawful discharges by tenants.

As a result, property owners should consider how to protect themselves from potential CWA liability for tenants' discharges. This protection could range from vigilant monitoring of tenants' discharges to seeking indemnity provisions in leases with tenants. Owners of industrial properties should consult experienced counsel before entering into leases that could potentially result in CWA liability.

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