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# Are Grounded Vessels Potentially Subject to the Resource Conservation and Recovery Act and Clean Water Act as Fill Material and Point Sources Engaging in Industrial Activity?

## Arkansas Environmental, Energy, and Water Law Blog

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A federal district court (Eastern District of Virginia) held that grounded vessels no longer used as boats but as pier storage facilities could be considered fill material subject to Resource Conservation and Recovery Act ("RCRA") permitting requirements. See *307 Campostella, LLC, v. Mullane*, No. 2:15cv224, 2015 WL 6673960 (E.D. Va. Oct. 30, 2015).

The Court also addressed whether grounded vessels discharging channeled stormwater into the harbor could constitute "point sources" engaging in industrial activity, and therefore, subject to Clean Water Act ("CWA") stormwater regulations.

The owner of riverfront property on the Elizabeth River ("plaintiff") sued Mullane for introducing unseaworthy vessels and an unlicensed pier/storage facility to the river, alleged creating overcrowded conditions, pollution, blight, and obstruction in the navigable waterway adjacent to the plaintiff's property. According to the plaintiff, Mullane's vessels and storage facility changed the bottom elevation of the waterway, negatively affected aquatic life, and caused economic harm to the plaintiff in the form of reduced rents and reduction in the value of his property.

The plaintiff first sought relief under RCRA.

RCRA includes a "citizen suit" provision providing two potential causes of action:

1. against any person in current and ongoing violation of any state or federal standard; and
2. against any person who has dealt or is dealing with solid or hazardous waste in a way that present an imminent and substantial endangerment to health or the environment.

Plaintiff claimed that Mullane was violating state and federal standards by operating a facility for the disposal and/or storage of solid waste without the permit required by law and for operating an Open Dump in violation of Virginia law. The plaintiff listed 150 dates over a five year period when storms caused rainwater runoff pollution from the many tons of Mullane's waste.

Mullane argued that the plaintiff's claim should be dismissed because it could not prove any ongoing violations. However, the court denied dismissal stating that the common sense fact that rain will fall in the future, showed that this violation was ongoing.

Mullane also argued that the waste did not present a RCRA imminent and substantial endangerment to health or to the environment. Because the plaintiff did not allege any specific RCRA violations, the court granted Mullane's motion to dismiss on this count but gave the plaintiff a chance to amend its complaint to add specific instances of violations.

The plaintiff also alleged that Mullane was in violation of the CWA.

The CWA prohibits the discharge of pollutants, including dredged or fill material, from a point source into waters of the United States without a permit. Fill material changes the bottom elevation of any portion of water or replaces any portion of water with dry land. The plaintiff argued that the unlicensed pier/storage facility and vessels changed the bottom elevation of the waterway, and thus represented fill material.

The plaintiff also alleged that stormwater flowing off of the vessels during rainstorms, and the bilge water the plaintiff pumped out of the vessels polluted the waterways. A vessel is listed as a type of point source, and stormwater is considered discharged when it is collected or channeled before being discharged.

The fact that the Plaintiff alleged that the stormwater entered the interior of Mullane's vessels, collected in the bilges, and was periodically removed was enough to classify the stormwater runoff as point source pollution. However, individuals are only required to secure permits for the discharge of channeled stormwater runoff if the discharges are associated with "industrial activity." Thus, the discharge must be directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. The fact that Mullane used the destroyed barge as an unlicensed pier storage facility, and that its contents were stored for future use as a reef was sufficient for it to be considered industrial activity.

Finally, the court dismissed the plaintiff's nuisance claim because the plaintiff did not specify the type of nuisance at issue.

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