



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

404 Wetland/Clean Water Act Enforcement: Federal Court Addresses Scope of Potential Liability Related to Subdivision Development

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A United States District Court (S. D. Georgia) ("Court") addressed in a June 30th Order certain issues arising out of a 404 Clean Water Act citizen suit enforcement action. See *Baker v. Mortgage of America Lenders, LLC et al*, 2022 WL 2374388.

The issue considered was whether Section 404 Clean Water Act liability could potentially be imposed upon an owner of certain lots in a residential development that did not undertake the alleged initial violations.

Mortgage of America Lenders, LLC ("MA") and TowneClub ("TC") are stated to be owners of a construction project in St. Simons Island, Georgia known as Captain's Cove Subdivision ("Captain's Cove"). MA owns a majority of the lots in the residential subdivision as well as certain wetlands subject to Clean Water Act 404 wetland jurisdiction.

TC is stated to own certain lots in the first phase and additional lots in the second phase.

Plaintiffs are individuals who live or own property near Captain's Cove. They brought three causes of action against both MA and TC which included:

1. Defendants engaged in unauthorized discharge of dredge and fill material into Wetland C by removing vegetation and constructing storm water drainage structures without a permit in violation of Section 301 and 404 the Clean Water Act
2. Defendants failed to implement and maintain best management practices for erosion and sediment control as required by the Georgia Environmental Protection Division General NPDES Permit in violation of Section 311 of the Clean Water Act
3. Defendants filled the subject wetlands in unauthorized locations in violation of Section 301 of the Clean Water Act

Plaintiffs were allowed to add TC as defendant arguing:

... [W]ithout TowneClub's cooperation, Mortgage of America cannot implement [Best Management Practices] on certain lots in Captain's Cove or otherwise comply with the [NPDES] permit

TC filed a motion to dismiss arguing that the complaint should be dismissed for:

1. Lack of subject matter jurisdiction
2. Failure to state a claim upon which relief can be granted

TC argued that subject matter jurisdiction was absent because it had:

... zero involvement with the development at the time the alleged violations occurred

It further argued that the Clean Water Act does not allow suits against adjacent landowners who do not own the land where the violations occurred.

The Court rejected this argument noting that Clean Water Act jurisdiction is premised upon a showing that the plaintiff:

... when the suit was filed, there existed a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future.

A good faith allegation of violations at the time the suit was deemed sufficient for jurisdictional purposes.

The Court held that plaintiffs made the necessary allegations even though TC did not commit the initial violations. They were noted to have alleged in their second amended complaint that TC is involved in continuing violations of the Clean Water Act with regard to:

1. Unauthorized discharge of dredge and fill material into Wetland C without a permit
2. Failure to implement and maintain Best Management Practices for erosion and sediment control as required by NPDES permit
3. Filling of the subject wetlands in unauthorized locations in violation of Section 401

The facts that the Court deemed sufficient for purposes of responding to a motion to dismiss were:

1. The subject wetlands are affected by the land surrounding them
2. TC owns lands immediately surrounding the subject wetlands
3. TC had notice of its alleged Clean Water Act violations at least 60 days before being added as a defendant

TC's involvement was therefore deemed by the Court to be (if true) involved in continuing violations making subject matter jurisdiction proper.

The Court also rejected the argument that despite subject matter jurisdiction plaintiffs failed to state a claim upon which relief may be granted. The claim was again held to be viable despite the argument that TC does not own the subject wetlands and the violations occurred before its purchase of the property surrounding.

The Court stated:

... This argument, however misunderstands Plaintiffs' allegations. Plaintiffs allege continuing violations of the CWA occurring on property TowneClub owns which as discussed... affects the Subject Wetlands so as to establish a claim for relief against Towneclub.

TC's motion to dismiss was denied.

A copy of the decision can be downloaded [here](#).