Citizen Suit Enforcement/Clean Water Act: Federal District Court Addresses Alleged Violation by Wetland Biofilter Stormwater Treatment System



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A United States District Court (W.D. Washington) ("Court") addressed in an October 31st Order a Clean Water Act citizen suit action seeking an injunction to remedy alleged illegal discharge of pollutants into a lake and its abutting wetlands. See *Bang v. Lacamas Shores Homeowners Association,* 2022 WL 16553016.

The issues arose out of the operation of a man-made wetland stormwater treatment system.

Lacamas Shores is a residential community on the southwest shore of Lacamas Lake in Clark County, Washington. The Lacamas Shores Homeowners Association ("HOA") maintains a wetland biofilter stormwater treatment system ("Biofilter"). It was constructed so that the HOA could obtain the necessary permits to undertake the development.

The Biofilter is described as a man-made wetland using vegetation to sequester and remove pollutants introduced by stormwater runoff from the development. The stormwater is stated to be collected in drainage basins and directed through various mechanisms, such as underground pipes and a bubbler, into the Biofilter. Stormwater is then discharged via two separate outlets into Lacamas Lake.

Steven D. Bang ("Bang") filed a Clean Water Act citizen suit against the HOA arguing that the Biofilter had not been properly maintained for several years. He alleged that because of the failure to plant new vegetation and harvest decomposing vegetation the Biofilter is generating new pollutants that are released into Lacamas Lake and the naturally occurring wetlands abutting it. Consequently, Bang argued that:

. . . The HOA's lack of maintenance of the Biofilter has transformed the Biofilter from a system that removes pollutants into a system that adds pollutants.

In other words, Bang argued that the HOA was violating Section 301(a) of the Clean Water Act by discharging pollutants from the Biofilter into the lake/wetlands without a National Pollutant Discharge Elimination System ("NPDES") permit. The relief sought included civil penalties and an injunction requiring the HOA to cease the alleged discharges, remediate the alleged environmental damage, and develop quality assurance procedures to ensure future compliance.

Cross-motions for partial summary judgment were filed and the Court addressed certain issues.

The issues addressed include:

- Whether Bank can prevail on its Clean Water Act claim if the Biofilter is classified as a water of the United States (The Clean Water Act defines the discharge of a pollutant to mean any addition of any pollutant to navigable waters from any point source.)
- The Court holds Bang cannot prevail if the Clean Water Act claim is premised on the Biofilter simultaneously being a point source and a water of the United States. The Clean Water Act encompasses a system in which discharging a pollutant encompasses a to-from relationship between point sources and navigable waters.
- The Clean Water Act's definition of the discharge of the pollutant expressly contemplates the addition of a pollutant to a navigable water.
- U.S. Environmental Protection Agency Water Transfers Rule clarifies that transfer to pollutants between separate waters of the United States does not constitute an addition of pollutants necessitating permit authorization.
- To the extent the Biofilter is classified as a water of the Untied States, Bang cannot prevail on a claim premised on the theory that it and its two outlets constitute point sources discharging to the lake/wetlands.
- Whether the alleged pollutant discharges are covered by the municipal permit (Argument that the Biofilter's pollutant discharges are not covered by the Western Washington Phase II Municipal Stormwater Permit ["Municipal Permit"])
- A Municipal Permit is applicable to owners or operators of regulated small Municipal Separate Storm Sewer Systems ("MS4s") located in specified areas of Washington.
- The Biofilter is not an MS4 because it is a private stormwater treatment facility owned and operated by a private entity.
- The Court holds that the HOA provided no response to the argument that the Biofilter is not an MS4 covered by the Municipal Permit.
- Is the Biofilter a meaningfully distinct body of water?
- The United States Supreme Court has held that the transfer of polluted water between two parts of the same waterbody does not constitute a discharge of pollutants under the Clean Water Act.
- The Court holds that the HOA has cited to nothing in the record to support its argument that the Biofilter cannot discharge pollutants to the lake/wetlands because all of those waters are hydrologically connected (i.e., they are not "meaningfully distinct waterbodies."
- HOA is not entitled to a ruling that the Biofilter is not a "meaningfully distinct body of water" from the lake/wetlands because it bears the initial burden of identifying portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of the claim.

The Court therefore holds:

1. Plaintiff cannot prevail on his Clean Water Act claim to the extent it is premised on the theory that the Biofilter is simultaneously a point source and a water of the United States.
2. The pollutant discharges from the Biofilter are not covered by the Western Washington Phase II Municipal Stormwater Permit.
3. The Court does not find that Biofilter is not a meaningfully distinct body of water.

A copy of the Order can be downloaded here.