

Three Lessons Regarding Stormwater Liability From Recent Washington Cases

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Each year environmental advocacy groups acting under section 505 of the Clean Water Act, 33 U.S.C. § 1365, send roughly three dozen notice of intent to sue letters to Washington businesses. These letters occasionally result written judicial decisions.

Three such decisions should be of particular interest to lessors and lessees subject to a National Pollutant Discharge Elimination System (“NPDES”) permit, such as the Washington Industrial Stormwater General Permit (“ISGP”) or Boatyard General Permit.¹ Distilled below are three critical items from these decisions.

1. A Lessor May Be Jointly Liable With Its Tenant When the Lessor is Aware Permit Violations Are Occurring and the Lessor Has Authority to Prevent the Violations

Landlords, parent companies or other entities, e.g. a port, that (1) purport to require a tenant industrial site operator to comply with environmental laws and (2) become aware of stormwater permit violations by the site operator may be held jointly liable for the site operator’s stormwater permit violations.

In *Puget Soundkeeper Alliance v. Cruise Terminals of America, LLC*², Cruise Terminals of America (“CTA”) leased Pier 66 from the Port of Seattle for purposes of managing vessel operations and conducting maintenance relating to cruise ship visits. Neither the Port nor CTA operated under an NPDES permit such as the ISGP. Puget Soundkeeper sued both the Port and CTA and argued each was liable for operating the terminal without permit coverage. The court reserved for later the question of whether terminal operations triggered ISGP coverage. The court noted, however, that if ISGP coverage was required, both the Port of Seattle and CTA would be liable for violations based on having had “sufficient control over the facility and knowledge of the alleged violations.”³

¹ *Puget Soundkeeper Alliance v. Louis Dreyfus Commodities LLC, et al.*, No. C14-803RAJ, 2016 WL 3458346 (June 24, 2016) (Order); *Puget Soundkeeper Alliance v. Cruise Terminals of America, LLC*, No. C14-0476 JCC, 2015 WL 7431415, *13 (Nov. 20, 2015) (Order on Parties’ Five Motions for Summary Judgment); *Puget Soundkeeper Alliance v. Rainier Petroleum Corp.*, No. C14-0829JLR (Dec. 16, 2015) (Order on Cross-Motions for Summary Judgment).

² No. C14-0476 JCC, 2015 WL 7431415 (Nov. 20, 2015).

³ *Id.* at *19. The court provided several examples to support its conclusion that the Port of Seattle had authority to control discharges, including the Port’s right to enter the facility and bring the facility into compliance with

The court rejected arguments that the Port had shifted responsibility to its tenant CTA. The Port had required CTA to accept the obligation to comply with environmental laws and gave CTA authority to issue stop work orders to third parties. Despite having tried to shift the responsibility for compliance to its tenant, the court concluded the Port was liable for violations the tenant failed to prevent.⁴

Lessors and lessees should consider this liability when drafting environmental provisions in lease agreements. Provisions that may require consideration include language relating to notice and information sharing, lease termination, and site improvements. Landlords should consider adding or revising indemnity language in lease agreements. Courts typically construe indemnity language narrowly. Accordingly, landlords may want indemnity language to specifically extend to Clean Water Act matters.

Of course, indemnity language is only useful if the tenant exists and has funds to meet its obligations when liability arises. Accordingly, landlords should also consider how to prevent violations as well as respond to information demonstrating violations are occurring. Notice of a permit violation can arise from information shared by the lessor's consultant, an administrative agency, or other party familiar with stormwater permitting.⁵ Even if not recognized as an NPDES permit violation, awareness of general source control problems (e.g., excessive mud in runoff) should also trigger a response.⁶

Finally, corporations should also be aware of this decision when structuring a transfer of permit coverage, because allegations of joint liability may arise even after Ecology transfers permit coverage. The court in *Louis Dreyfus Commodities LLC* suggested liability might arise for

environmental laws. The court further cited a Field Guide issued by the Port to its tenants prohibiting certain activities by its tenants, the Port's right to conduct annual inspections, conduct environmental testing and the tenant's obligation to notify the Port of maintenance work.

⁴ Citing similar grounds, the court noted that the tenant could be liable for discharges caused by the tenant's visitor (i.e., cruise ships). The court noted that CTA was provided advanced notice of work by its visitors, could deny access, could require compliance with "all Legal requirements", used surveillance cameras to oversee terminal operations, and could issue stop work orders.

⁵ A Port of Seattle consultant told CTA that CTA should obtain ISGP coverage based on its vehicle fueling operations. It is conceivable that permit violations identified by the Washington Department of Ecology and reported to the lessor could also provide this notice.

⁶ The case does not indicate whether a lessor needs to recognize that site activities are NPDES permit violations per se, or whether liability can be found based on knowledge of, for example, widespread disregard for source control measures. However, the case cited in *Cruise Terminals of America* as authority for joint liability involved veil piercing theory: *United States v. Gulf Park Water Co.*, 972 F.Supp. 1056 (S.D. Miss. 1997). The U.S. Supreme Court criticized application of veil piercing theory in its *United States v. Bestfoods* decision, issued in 1998. 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). Under veil piercing theory, liability for a subsidiary's acts may be assigned to a parent company or its officers when there is evidence of intent to use the subsidiary for wrongful purposes and the parent controls the subsidiary.

A consent decree reached by the parties requires CTA and the Port to each pay Puget Soundkeeper \$250,000 in settlement of PSA's claims.

violations following a permit transfer if evidence indicated the former permit holder had knowledge of facility operations and retained authority to control discharges.⁷

2. Non-Stormwater Discharges Can Give Rise to Enforcement and Costly Improvements

The decisions are also helpful reminders that anything (even food grade material) that falls into the water can give rise to Clean Water Act enforcement. The lawsuit against the Louis Dreyfus entities included allegations of grain and grain dust discharges, while the Cruise Terminals' matter included alleged discharges of wash water, paint, and other materials associated with maintenance. The allegation that coal dust was discharged by rail cars was the basis for other recent Clean Water Act enforcement action.⁸

The use of video and photos taken from the water or adjacent public locations is commonly offered as evidence in support of these types of Clean Water Act lawsuits.⁹ Accordingly, stormwater pollution prevention plans and site infrastructure should be cognizant of particulates, drips, and other matter that can reach surface water directly or through the stormwater system.

Finally, these lawsuits suggest that when infrastructure planning is reactive to third-party enforcement, the results can be costly, extensive, and involve long-term third-party oversight. For example, the consent decree signed by the Louis Dreyfus entities provides for Puget Soundkeeper's right to review upland site investigation results; modified pier surfaces; modified stormwater conveyance systems, modified grain conveyances systems, and a bird control plan to prevent bacterial contamination of Puget Sound. Louis Dreyfus also agreed to pay for Soundkeeper's review of certain facility changes, and agreed to consider Soundkeeper's suggestions for additional SWPPP and site improvements. In addition to those payments, the consent decree provides for a \$699,000 penalty and reimbursement of the plaintiff's attorney's fees of \$403,000.

3. Plaintiffs Will Argue that Piers and Docks Are Point Sources and Subject to Monitoring

In each of the three cases cited above Puget Soundkeeper Alliance argued the defendant was liable for failing to sample discharges from a pier. Though the issue was not thoroughly addressed in all three decisions, the decision in *Louis Dreyfus Commodities LLC* is instructive.

⁷ *Puget Soundkeeper Alliance v. Louis Dreyfus Commodities LLC, et al.*, No. C14-803RAJ, 2016 WL 3458346, *3 (June 24, 2016) (Order).

⁸ See <http://columbiariverkeeper.org/top-stories/taking-big-coal-to-court/>.

⁹ *Puget Soundkeeper Alliance v. Cruise Terminals of America, LLC*, No. C14-0476 JCC, 2015 WL 7431415, *14 (Nov. 20, 2015) (photos and observation by Soundkeeper member); <http://www.pugetsoundkeeper.org/2016/01/28/the-souder-newsletter-january-2015/> (describing Rainier Petroleum operations visible by water).

In that case the court found that a genuine issue of material fact prevented a decision as to whether a shipping pier was a point source subject to sampling. The defendants had argued the pier was not a point source because it was merely a flat surface that did not confine or contain stormwater. The court was skeptical. The court noted that Ecology considered the pier a point source and the pier was “graded in a manner that conveys stormwater” into surface water.¹⁰ The court noted that another court in the district had “implicitly” found that a pier was a point source.¹¹ As noted above, the Louis Dreyfus entities subsequently agreed to modify the facility piers, including installing a surface on its shipping pier to facilitate stormwater collection and barriers along pier edges.

The cases underscore an important lesson for facilities with piers, rail lines, or other over-water structures: environmental groups will argue monitoring, treatment and reporting obligations apply to these structures if they collect and convey stormwater or allow particulate discharges. Consequently, facilities with piers should consider retaining experienced advice regarding site operations and whether the facility SWPPP is adequate.

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¹⁰ 2016 WL 3458346 at *9.

¹¹ *Id.* (citing *Puget Soundkeeper Alliance v. Rainier Petroleum Corp.*, Case No. C14-0829JLR, Dkt. #75 at 23-24) (Dec. 16, 2015). The court in *Rainier Petroleum Corp.* was not asked to decide whether the pier was a point source, but only whether Soundkeeper had provided adequate notice of its claims relating to pier discharges.