IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

307 CAMPOSTELLA, LLC,

Plaintiff,

v. Civil Action No: 2:15-cv-224

TIMTOTHY J. MULLANE,

SIX M, LLC,

AMERICAN MARINE GROUP, INC.,

AMERICAN MARINE GROUP, LLC,

DOMINION MARINE GROUP, LTD.,

MULLANE BROS MARINE TRANSPORTATION, LLC

Defendants.

BRIEF IN SUPPORT OF MOTION TO DISMISS

Come now the Defendants, Timothy J. Mullane[1], American Marine Group, Inc., American Marine Group, LLC, Dominion Marine Group, Ltd. and Mullane Bros Marine Transportation, LLC ("Defendants"), pursuant to Local Rule 7 and Rule 12(b)(6) of the Federal Rules of Civil Procedure and submit the following Brief in Support of Motion to Dismiss Plaintiff's Complaint filed herein.

I. INTRODUCTION

Though Plaintiff's Complaint is rich with irrelevant facts and photographs, it fails to state any claim upon which relief can be granted. In utilizing a shotgun approach to drafting its Complaint, Plaintiff has overlooked the fact that none of its claims are cognizable under federal law. In so doing, the Complaint attempts to twist and contort federal statutes and regulations to

[1] Defendant Mullane's correct name is Timothy S. Mullane.

the point of absurdity, while at the same time ignoring the fact that these same federal statutes and regulations preclude it from asserting any claim against these Defendants. Plaintiff's Complaint should be dismissed in its entirety, and Defendants should be awarded their costs and fees as the prevailing parties under 33 U.S.C.1365(d) and 42 U.S.C. § 6972(e) for having to defend this so clearly meritless suit.

II. RELEVANT FACTS

In very colorful language, Plaintiff's Complaint alleges that Defendants own a number of vessels that they store in a small creek, which allegedly obstruct the waterway and pollute the river. Plaintiff's claims arise under the Rivers and Harbors Act (RHA), codified at 33 U.S.C. § 403, 409, and the citizen suit provisions of the Resource, Conservation and Recovery Act (RCRA), codified at 42 U.S.C. § 6972, the Clean Water Act (CWA), codified at 33 U.S.C. § 1365 and Virginia Common law. In Count I, Plaintiff asserts a claim under the RHA for the alleged obstruction of navigation by Defendants' pier/storage facility and vessels at Plaintiff's bulkheaded property. (Compl. ¶¶22-37.) In Count II, Plaintiff again asserts a claim under the RHA based on Defendants' alleged obstruction of the creek with their vessels at Plaintiff's non-bulkheaded property. (Compl. ¶¶38-42.) Count III is brought under the RCRA and the Virginia Waste Management Act and alleges that Defendants are discharging pollutants from their pier/storage facility. (Compl. ¶¶43-53.) In Counts IV, V and VI, Plaintiff alleges that Defendants' pier/storage facility and two of its vessels are aground, rendering them 'fill material' under the CWA and that the Defendants have no permits for these discharges. (Compl. ¶¶54-73.) In Count VII, Plaintiff alleges that stormwater which flows off of Defendants' vessels during rain storms is polluting the river and is violative of the CWA and its implementing regulations, as well as Virginia Code § 62.1-44.5. (Compl. ¶¶74-85.) Finally, Count VIII asserts

a Virginia common law nuisance claim. (Compl. ¶¶86-90). Though Plaintiff's Complaint is chock full of lurid details about Defendants' alleged unlawful practices, when the hyperbole is stripped away, it is clear that Plaintiff has failed to state any claims upon which relief can be granted and the entire Complaint should be dismissed under Rule 12(b)(6) and/or 12(b)(1) of the Federal Rules of Civil Procedure.

III. ARGUMENT

A. STANDARD OF REVIEW FOR MOTION TO DISMISS UNDER RULE 12(b)(6)

The standard of review this Court must apply to Defendants' Motion to Dismiss is well-known. "A pleading that states a claim for relief must contain . . . a short and plan statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Pro. 8(a)(2). When a pleading fails to satisfy this standard, it is subject to dismissal under Rule 12(b)(6) when it does not "contain sufficient factual matter, accepted as true, 'to state a claim that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). A complaint "that allows the court to draw the reasonable inferences that the defendant is liable for the misconduct alleged" has facial plausibility and satisfies the pleading standard of Rule 8(a)(2). Id., quoting Twombly, 550 U.S. at 556, 127 S.Ct. 1955. Importantly, a court is not required "to accept as true a legal conclusion couched as a factual allegation" (Papasan v. Allain, 478 U.S. 265, 286 (1986)), or a legal conclusion unsupported by factual allegations. Iqbal, 556 U.S. at 678. It is against this easily understood standard of federal law that Plaintiff's Complaint must be analyzed.

B. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(b)(6)

1. **No private right of action exists to enforce violations of Section 10 and 15 of the RHA, such that Counts I and II must be dismissed with prejudice.**

Plaintiff's claims for private enforcement of Defendants' alleged violation of Section 10 and 15 of the RHA fail as a matter of law because neither claim is cognizable under federal law. Plaintiff attempts to support its claims with details of alleged obstruction of the creek that adjoins all parties' properties. (Compl. at 22-42.) It also incorporates photographs to support its obstruction claims. Though the Court must take these allegations as true on a Motion to Dismiss, the United States Supreme Court has long ago concluded that there is no private right of action under the RHA.

In California v. Sierra Club, 451 U.S. 287 (1981), the court analyzed the question of whether or not the RHA provides for a private right of action and definitively answered the question in the negative. At issue in that case was Section 10 of the Act, codified at 33 U.S.C.A. 403. The court used the factors outlined in Cort v. Ash, 422 U.S. 66 (1975) to determine whether Congress included an implied right of action in the Act. Sierra Club, 451 U.S. at 298. After applying only the first two of four factors in Cort, the court held that the Act did not contain any private right of action. Id. In reversing the Ninth Circuit, the Supreme Court held that the "federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide" . . . and the "language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the especial benefit of a class of persons but rather that it was intended to benefit the public at large through a general regulatory scheme to be administered by the then Secretary of War." Id. at 297; Louisiana ex. rel. Guste v. M/V TESTBANK, 752 F.2d 1019, 1030 (5th Cir. 1985) (no private right of action under § 10 and 13); Evergreen Int'l, S.A. v. Marinex Construction Co., Inc., 477 F. Supp.2d 681

(D.S.C. 2007) (no private right of action under § 10); Pelican Marine Carriers, Inc. v. City of Tampa, 1991 WL 325793 (M.D. Fla. July 30, 1991) (no private right of action under § 10); Buchanan Marine, Inc. v. McCormack Sand Co., 670 F. Supp. 469 (E.D.N.Y. 1987) (same). Though Sierra Club focused on Section 10 of the Act, the broad holding of the court in concluding that the Act provided no private right of action applies equally to Section 15 of the Act, as other courts have concluded.

In citing Sierra Club, the district court in Dunham-Price Group, L.L.C. v. Port Aggregates, Inc., 2006 WL 2112953 (W.D. La. July 26, 2006) held that Section 15 of the Act, codified at 33 U.S.C. § 409, also does not contain a private right of action. Like Section 10, in the text of the Act, Congress was silent on the question of whether or not Section 15 provided a private remedy. Id. at *3. In trying mightily to avoid dismissal, the plaintiff argued that it had merely alleged violations of 33 U.S.C. § 409, and was not alleging a cause of action under Section 15. Id. The court was unconvinced, and held expressly "that § 409 does not create a private right of action and the claims filed pursuant to 33 U.S.C.A. §409 [would] be dismissed." Id. at 4; see also, M/V TESTABANK, 752 F.2d at 1030 (Sierra Club foreclosed plaintiff's claim for private right of action under Section 13 of the Act); Port of South Lousiana v. Tri-Parish Indus., Inc., 927 F. Supp.2d 332, 338 (E.D. La. 2013) (there is no private right of action to enforce 33 U.S.C. § 409).

Because the United States Supreme Court has ruled that no private right of action exists under the RHA, Counts I and II of Plaintiff's Complaint seeking relief under these statutes must be dismissed with prejudice.

2. **Count III of Plaintiff's Complaint must be dismissed because Plaintiff has failed to plead facts giving rise to a claim under the RCRA and there is no private right of action for a violation of Virginia Code § 10.1-1400, *et. seq.***

a. 42 U.S.C. § 6901, et. seq.

Plaintiff has failed to plead facts upon which relief can be granted under the RCRA. "RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." Prisco v. A&D Carting Corp., 168 F.3d 593, 608 (2d Cir. 1999) (quoting Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996). RCRA contains a citizen suit provision which allows private parties to sue under certain specific circumstances and for certain specific types of damages. In order to properly allege a claim under RCRA, a "plaintiff must show that (1) the defendant was or is a generator or transporter of solid or hazardous waste or owner or operator of a solid or hazardous waste treatment, storage or disposal facility, (2) the defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste, as defined by RCRA, and (3) that the solid or hazardous waste in question may pose an imminent and substantial endangerment to health or the environment." Bologna v. Kerr-McGee Corp., 95 F. Supp.2d 197, 202 (S.D.N.Y. 2000) citing Prisco, 168 F.3d at 608; Meghrig, 516 U.S. at 480 (RCRA citizen suit requires "imminent and substantial endangerment to health or environment"); ABB Indus. Sys., Inc.v. Prime Tech., Inc., 120 F.3d 351, 359 (2d. Cir. 1997); Adams v. NVR Homes, Inc., 135 F. Supp. 2d 675, 688 (D. Md. 2011) ([p]laintiff must show "imminent and substantial endangerment to health or environment" to show RCRA claim); 42 U.S.C. § 6972(a)(1)(B). Plaintiff has failed to allege facts upon which relief can be granted under the citizen suit provisions of RCRA.

The allegations in the Complaint are insufficient as a matter of law to state a claim under RCRA, and the facts alleged therein actually defeat the claim, because they implicitly preclude

an important allegation. In reviewing the Complaint, Plaintiff alleges sufficient facts to satisfy the first two elements of a private right of action under RCRA. In paragraph 44, Plaintiff alleges that Defendants own and operate a storage facility which contains solid waste, as that term is defined by RCRA. Paragraphs 46 and 47 also allege that the Defendants store solid waste at their facility. However, the third element necessary to plead a proper claim for relief under RCRA is absent from Plaintiff's Complaint. Plaintiff fails to allege that "the solid or hazardous waste in question may pose an imminent and substantial endangerment to health or the environment." Bologna, 95 F. Supp.2d at 202. In several paragraphs in Count III, Plaintiff alleges that waste materials are being released into the environment or are discharging into the river, but it never alleges that there is an "imminent and substantial endangerment to health or the environment." How could the Plaintiff make such an allegation when its own pleadings allege that the condition has existed at Defendant's facility for five years? (Compl. ¶49.) A condition that has existed for such a long period of time without anyone, including the Plaintiff, taking action under RCRA belies any notion that the condition of the storage facility is an "imminent and substantial endangerment to health and the environment." Because Plaintiff has failed to allege this critical third factor necessary to recover under the RCRA, Count III should be dismissed with prejudice. See, e.g., Cross Oil Co. v. Phillips Petroleum Co., 944 F. Supp. 787, 788 (E.D. Mo. 1996)(RCRA claim dismissed for Plaintiff's failure to allege that Defendant's actions presents "imminent and substantial endangerment to health and the environment.")

Count III of Plaintiff's Complaint suffers from another related pleading infirmity independent of its failure to allege the third element of a RCRA claim. In order for such a claim to be actionable under 42 U.S.C. § 6972(a)(1)(A)[2], the Defendants must be currently in violation

---

[2] Plaintiff does not denominate whether it is filing its RCRA citizen suit pursuant to 42 U.S.C. 6972(a)(1)(A) or 6972(a)(1)(B).

of some "permit, standard, regulation condition, requirement, prohibition, or other order which has become effective pursuant to this chapter." ABB Indus. Systems, Inc., 120 F.3d at 359 citing 42 U.S.C. 6972(a)(1)(A). In paragraph 49 of Count III, Plaintiff makes clear that he is alleging wholly past violations by noting that the discharges occurred on "180 dates in the last 5 years." (Compl. ¶49.) As such, Plaintiff cannot maintain a claim under 42 U.S.C. § 6972(a)(1)(A) because the Complaint only alleges wholly past RCRA violations. Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1315 (2d Cir. 1993) (§ 6972(a)(1)(A) claim dismissed because it alleged only past RCRA violations).

Moreover, to the extent Plaintiff is seeking compensatory damages in his Complaint under RCRA, that claim must also be dismissed with prejudice. RCRA does not permit the recovery of compensatory damages in a private lawsuit. Mulcahey v. Columbia Organic Chemicals Co., Inc., 29 F.3d 148, 152 (4th Cir. 1994); see, Megrhig, 516 U.S. at 484. Pursuant to the aforementioned case law, Count III of Plaintiff's Complaint should be dismissed with prejudice.

b. Va. Code § 10.1-1400

Additionally, there is no private right of action under Virginia law for the enforcement of Virginia Code 10.1--1400. In Virginia, when "a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." Vansant & Gusleer, Inc. v Washington, 245 Va. 356, 360 (1993) (quoting Sch. Bd. of Norfolk v. Giannoutsos, 238 Va. 144, 147 (1989). Importantly, in the Commonwealth a "private right of action is not automatically created by a penal or regulatory statute." Black & White Cars, Inc. v. Groome Transp., 247 Va. 426, 430 (1994). Virginia "is not inclined to recognize private rights of action that have not been clearly legislated because of its regard for the state legislature as a

'repository of soverign powers, whose dispensation must in any context be strictly construed.'" Riverside Hospital, Inc. v. Optima Health Plant, 82 Va. Cir. 250, *2 (Richmond City February 17, 2011) (quoting A&E Supply Co. v. Nationwide Mut. Fire. Ins. Co., 798 F.2d 669, 674 (4th Cir. 1986) (citing Commonwealth v. County Rd. of Arlington County, 217 Va. 558, 577 (1977) ("the rule is clear that where a power is conferred and the mode of its execution is specified, no other method may be selected, any other means would be contrary to legislative intent and, therefore, unreasonable."). Even a cursory examination of Va. Code § 10.1-1400 makes it clear that the legislature did not intend it to create a private right of action.

Va. Code § 14.1-1400 is part of the Virginia Waste Management Act which sets up a Board and provides it with certain specific powers. Va. Code 14.1-1402. More specifically, the Board, among other things, has the plenary power to "supervise and control waste management activities in the Commonwealth." Va. Code § 14.1-1402. The Virginia Waste Management Act sets up a comprehensive regulatory scheme to ensure proper permitting and that enforcement mechanisms are in place to ensure proper regulation and disposal of waste management in Virginia. Id. Importantly, the powers of the Board include instituting legal proceedings to enforce compliance with the Act. Va. Code § 14.1-1402(19). By specifically empowering the Board to institute legal proceedings to ensure compliance with the Act, the Virginia General Assembly has foreclosed a private right of action because it specified a 'mode of execution' for exercising the power of enforcement which makes "any other means [including a private right of action] would be contrary to legislative intent and, therefore, unreasonable." County Rd. of Arlington County, 217 Va. at 577; A&E Supply Co., Inc., 798 F.2d at 674 (citing County Rod. of Arlington County, 232 S.E.2d at 42) ("the doctrine of implied powers should never be applied to create a power that does not exist or to expand an existing power beyond rational limits").

Plaintiff has failed to allege sufficient facts to state a claim for a citizen suit under RCRA and Virginia Code § 14.1-1400 provide a private right of action, such that the claims Plaintiff asserts in Count III must be dismissed as a matter of law.

3. Counts IV, V, and VI should be dismissed because they do not assert cognizable claims under the CWA.

In each of Counts IV, V and VI, Plaintiff attempts to assert that Defendants' have violated the CWA and, more specifically, its implementing regulations by placing a "pier/storage facility" and certain specific vessels on the creek bottom. (Compl. ¶¶ 55-56, 61-62, 68-69.[3]) According to the Plaintiff, this pier/storage facility and these vessels which are allegedly aground are "fill material" under the CWA and its implementing regulations, which allegedly gives it a cause of action under the citizen suit provision of the Act. However, a careful reading of the relevant implementing regulations makes it clear that the pier/storage facility and these vessels are not and can never be "fill material," such that Plaintiff cannot base his causes of action them.

Simply put, a storage facility, a vessel, including a dumb barge, cannot be "fill material" under the terms of CWA and its implementing regulations. According to the regulations implementing the CWA, the term "fill material means material placed in waters of the United States where the material has the effect of . . . (ii) Changing the bottom elevation of any potion of a water of the United States ... [e]xamples of fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." 33 C.F.R. § 323.2(e)(1). In each of these counts, Plaintiff alleges that by using the storage facility and allowing the vessels to run aground, Defendants are allegedly

[3] In Count IV, Plaintiff alleges that Defendants' "pier/storage facility" is "fill material." In Count V, Plaintiff alleges that Defendants' vessel ex-USS YRST-2 is "fill material" and in Count VI, Plaintiff alleges that Defendants' Barge ATC-12000 is "fill material" under the terms of the Clean Water Act.

discharging "fill material" into the waterway. (Compl.¶¶ 57, 63, 70.) The implementing regulations go on to say:

> "[D]ischarge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devies such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plans and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; artificial reefs."

33 C.F.R. § 323.2(f). The whole concept of a facility or vessel clearly does not fit into either of these definitions. The commonality between the listed items makes it clear that pier/storage facilities and vessels are not included within the definition. As the Court can see, no amount of linguistic gymnastics can transmogrify these facilities and vessels into "fill material" as that term is defined in the applicable federal regulation. Nor does placing these facilities and vessels on the creek bottom constitute the "discharge of fill material" under the aforementioned regulatory definitions. Though it is possible for a sunken barge to have "fill material" on it (see Starr Indemn. & Liab. Co. v. Continental Cemet Co., LLC, 2013 WL 1442456, *18 (E.D. Mo. April 9, 2013)), the facility and vessel themselves cannot constitute "fill material."

Courts throughout the country that have addressed this specific issue have concluded that the term 'fill material' is limited to rock, sand, soil, etc., as described in 33 C.F.R. § 323.2(e)(1). For example, in U.S. v. Brink, 795 F. Supp.2d 565 (S.D.Tex. 2011), the court concluded that dumping 210 yards of concrete into a waterway constituted dumping "fill material" in the water

which violated the CWA. Conversely, the court in Bragg v. Robertson, 72 F. Supp.2d 642 (S.D.W.V. 1999), the district court held that excess mining spoils was "a pollutant and waste material" and not "fill material" under the CWA and its regulations. See also, Resource Investments, Inc. v. U.S. Army Corp. of Engineers, 151 F.3d 1162 (9th 1998) (solid waste not "fill material" under the CWA).

Not only have the Defendants been unable to find any case holding that a pier/storage facility and/or grounded vessel constitute "fill material" under the terms of the CWA, basic tenets of statutory construction also strongly suggests that cannot be the case. To interpret "fill material" as defined under 33 C.F.R. 323.2 to include pier/storage facilities and ships, vessels and barges would run afoul of the statutory interpretive principle *ejusdem generis*. That maxim "limits general terms that follow specific ones to matters similar to those specified." Gooch v. U.S., 297 U.S. 124, 128 (1936); Keenan v. Bowers, 91 F. Supp. 771, 774 (D. S.C. 1950) (same). A pier/storage facility and vessel or barge are not included in the specific items that fit the definition of "fill material" contained in the regulatory definition, so the question becomes whether they can constitute "materials used to create any structure or infrastructure in the waters of the United States." 33 C.F.R. § 323.2(e)(1). The answer is obviously no. A pier/storage facility and/or vessel have nothing in common with the enumerated specific examples of "fill material." Though it is certainly possible that a pier/storage facility could contain "fill material," the facility itself cannot be "fill material." Similarly, a vessel or barge is not and can never be 'materials used to create any structure or infrastructure' because the vessel or barge is a 'structure or infrastructure' in the waters of the United States.

Moreover, if Plaintiffs interpretation of the definition of "fill material" were correct, then each time a vessel ends up on the bottom of a creek bed due to low tide or a storm, the owner of

that vessel has committed a violation of the CWA, which is simply absurd. As this Court is aware, interpreting statutes in a manner that would lead to absurd results should be avoided. Fagnant v. K-Mart Corp., 2013 WL 69101907, *5 (D.S.C. 2013). There can be no doubt that a storage facility and a vessel cannot be "fill material" under the CWA, such that Counts IV-VI must be dismissed.

4. Count VII must be dismissed because stormwater runoff is not actionable under the facts alleged in the Complaint under either the Clean Water Act or Va. Code § 62.1-44.5

a. Stormwater regulation under the CWA

In Plaintiff's vaguely worded Count VII, he alleges that during inclement weather, storm water drains off Defendants' vessels which, according to Plaintiff, automatically pollutes the river. (Compl. ¶76.) Plaintiff's claim in this count is defeated by the text of the very statutes and regulations it invokes to support it. Simply put, there is no requirement for these Defendants to obtain any permits related in any way to the alleged storm water run-off that occurs when it rains on its vessels under the facts alleged in the Complaint.

33 U.S.C. §§ 1341 and 1362 address when a permit is required where a Defendant might discharge stormwater runoff into a waterway. Pursuant to § 1341(a)(1), "any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates." 33 U.S.C. § 1341(a)(1). A "discharge" under the CWA is "any addition of any pollutant to navigable waters from any point source." Id. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be

discharged. . . " 33 U.S.C. § 1362(14). Stormwater run-off can be "a nonpoint source or point source . . . depending on whether it is allowed to run off naturally (and thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge)." Northwest Environmental Defense Center v. Brown, 640 F.3d 1063, 1071 (9th Cir. 2011) rev'd on other grounds in Decker v. Environmental Defense Center, 133 S.Ct. 1326 (2013). "The text of the [Clean Water Act] and the case law are clear that some type of collection or channeling is required to classify an activity as a point source" and, thus, subject to regulation. Greater Yellowstone Coal v. Lewis, 628 F.3d 1143, 1152 (9th Cir. 2010), as amended (January 25, 2011). Importantly for purposes of this case, "[d]iffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is *not subject to federal regulation.*" Envtl. Def. Ctr., Inc. v. U.S. EPA, 344 F.3d 832, 841, n. 8 (9th Cir. 2003) (emphasis added); Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 221 (2nd Cir. 2008). As the Ninth Circuit Court of Appeals put it "[s]uch allegations of general storm water runoff do not establish a 'point source' discharge absent some allegation that the stormwater is discreetly collected and conveyed to waters of the United States." Ecological Rights Foundation v. Pacific Gas & Elec. Co., 713F.3d 502, 509 (9th Cir. 2013); see also, Decker v. Northwest Environmental Defense Center, 133 S.Ct. 1326 (2013); Woods Knoll, LLC v. Lincoln, Ala., 548 Fed. Appx. 577, 580 (11th Cir. 2013). There is simply no allegation in the Complaint that expressly or impliedly states that Defendants collected or conveyed any of the stormwater to waters of the United States. The Complaint alleges nothing more than natural runoff from Defendants' vessels which allegedly finds its way into the waters of the United States. (Compl. ¶76). As such, there is no requirement to obtain a permit under the

facts alleged in the Complaint, as natural stormwater runoff is not subject to federal regulation. Envtrl. Def. Ctr., Inc., 344 F.3d at 841, n. 8.

In addition, not only does case law make it clear that natural stormwater runoff is not subject to the CWA, the specific regulations implementing these sections of the CWA make it clear that the stormwater alleged to be polluting the river in Plaintiff's Complaint is not subject to federal regulation and, thus, not reachable by a citizen's suit pursuant to 33 U.S.C. § 1365. 40 C.F.R. § 122.26 governs the CWA's regulation of stormwater runoff and outlines when permits are necessary. A permit is required when the discharge is "associated with an industrial activity." "Stormwater discharged associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). As noted above, Plaintiff does not allege that the Defendants are "collecting and conveying storm water" and, moreover, there is no allegation in the Complaint that Defendants are engaging in "manufacturing, processing or raw materials storage area at an industrial plant." Because these allegations are necessary to properly allege a CWA claim for unlawful discharge of stormwater under applicable implementing regulations, Count VII must be dismissed. It is clear from the case law and the text of the applicable regulations that Plaintiff has failed to plead a cognizable claim under the CWA in Count VII of the Complaint.

b. Va. Code § 62.1-44.5

Though Plaintiff invokes Va. Code § 62.1-44.5 in support of his claim in Count VII, that statute cannot provide him a private right of action for the same reason that Virginia Code § 10.1-1400 cannot provide him a safe haven. The comprehensive statutory regimen containing Virginia Code § 62.1-44.5 does not provide for any private right of action on the part of anyone

aggrieved by an alleged violation of the statute. As noted above, when the Virginia General Assembly provides a remedy, it is presumed to be to the exclusion of all others. County Rd. of Arlington County, 217 Va. at 577. Consequently, Count VII, to the extent it claims relief under Virginia Code § 62.1-44.5 should be dismissed.

5. **Plaintiff's nuisance claim found in Count VIII must also be dismissed for failure to state a claim on which relief can be granted.**

In Count VIII, Plaintiff attempts to plead a common law nuisance claim and incorporates prior claims into this final count. Count VII is really two separate claims: one nuisance claim tied to the allegations found in Counts I and II of the Complaint and a separate claim tied to the allegations found in Counts III-VII. In Virginia, there are two types of nuisance claims: public and private nuisances.

> "[P]ublic or common nuisances, which affect people generally, and private nuisances which may be defined as anything done to the hurt of the lands, tenements, or hereditaments of another. A private nuisance is an activity which unreasonably interferes with the use and enjoyment of another's property. In other words, a private nuisance is one which implicates or interferes with a right or interest that is unique to an individual, such as an interest in land."

Virginia Beach v. Murphy, 239 Va. 353, 355 (1990) (citation omitted). Since the allegations in Plaintiff's Complaint relate to its interest in an adjoining piece of property and not the public in general, Defendants presume Plaintiff intends to allege a private nuisance claim[4]. A 'nuisance' is "everything that endangers life or health, or obstructs the reasonable and comfortable use of property." Barnes v. Quarles, 204 Va. 414, 417 (1963); Bragg v. Ives, 149 Va. 482, 497 (1927) ("nuisance . . . extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.") Though endangerment to "life or health" is one critically important element of a nuisance claim,

[4] A 'public nuisance' is "a condition that is a danger to the public . . . " Taylor v. City of Charlottesville, 240 Va. 367, 372 (1990). Plaintiff's Complaint does not allege that the Defendants' alleged obstructions are a danger to the public, foreclosing the possibility that the Complaint attempted to assert a 'public nuisance' claim.

Plaintiff fails to plead this necessary element in support of its nuisance claim based on Counts III-VII. Nowhere in those counts, or anywhere else in the Complaint, does Plaintiff allege that Defendants' actions allegedly affect its "life or health." In each of Counts III-VII, Plaintiff alleges that the Defendants alleged unlawful discharges cause "blight in the waterway" and that the vessels adversely affect aquatic life in the waterway, but the Complaint never alleges that the actions of the Defendants "endangers life or health." As such, any nuisance claim based on an "endanger to life and health" fails as a matter of law.

Plaintiff also fails to plead any private nuisance based on Defendants' alleged obstruction of "the reasonable and comfortable use of property." Bragg, 149 Va. 497. This portion of Plaintiff's nuisance claim is based on the allegations contained in Counts I and II, in which he alleges that Defendants' have obstructed the waterway with their vessels. (Compl. at 22-42.) However, looking closely at the allegations contained in these paragraphs reveals that Plaintiff has not alleged the facts necessary to support a common law nuisance claim. As the Court can see, the allegations contained in these paragraphs relate to the Defendants' alleged "obstruction the Defendants caused *in the channel*." (Compl. at 30, 33, 34, 37, 39, 40,41, 42 (emphasis added). Though Plaintiff alleges that Defendants obstructed the channel, it never alleges that Defendants "obstruct the reasonable and comfortable use of [Plaintiff's] property." Bragg, 149 Va. at 497. Since the gravamen of any nuisance claim is the defendants actions in preventing a plaintiff from using his property, and this critical allegation is missing from Plaintiff's Complaint, Count VIII must be dismissed for failure to state a private nuisance claim.

6. Plaintiff may not recover compensatory damages under the RCRA or the CWA.

Plaintiff is not entitled to compensatory damages under the facts alleged in the Complaint. As noted above, there is no private right of action for enforcement of the RHA, such

that Counts I and II are not maintainable as a matter of law. Even if this Court concludes that Plaintiff has properly plead the remaining claims, the federal statutory claims made under RCRA and CWA do not permit the recovery of compensatory damages. As the Sixth Circuit has noted "The RCRA [Resource, Conservation and Recovery Act], like the CWA [Clean Water Act], does not provide for compensatory damages." Ailor v. City of Maynardsville, Tennessee, 368 F.3d 587, 601 (6th Cir. 2004) citing Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996); Saline River Properties, LLC v. Johnson Controls, Inc., 823 F. Supp.2d 670, 677 (E.D. Mich. 2011) (same). As such, the compensatory damage claims made in Counts III-VIII should be dismissed because they are not recoverable as a matter of law.

IV. CONCLUSION

Plaintiff has failed to allege facts upon which relief can be granted. Counts I and II should be dismissed because there is no private right of action for enforcement of the Rivers and Harbors Act. Count III is fatally defective because it fails to allege all facts necessary to support a claim under the RCRA. Counts IV-VI should be dismissed because facilities and vessels cannot constitute 'fill material' under the terms and regulations of the CWA. Count VII should be dismissed because the facts as alleged to not give rise a requirement that the Defendants have a permit to discharge stormwater. Lastly, Count VIII should be dismissed because Plaintiff fails to allege facts upon which relief can be granted under a common law nuisance.

For the reasons stated herein and any articulated at oral argument, Defendants, Timothy Mullane, American Marine Group, Inc., American Marine Group, LLC, Dominion Marine Group, Ltd. and Mullane Bros Marine Transportation, LLC ("Defendants"), move this Court for entry of an Order dismissing Plaintiff's Complaint filed herein and an award of their costs and fees incurred in defending this action.

TIMOTHY J. MULLANE, AMERICAN MARINE GROUP, INC., AMERICAN MARINE GROUP, LLC, DOMINION MARINE GROUP, LTD. AND MULLANE BROS MARINE TRANSPORTATION, LLC

By: /s/

Of Counsel

Bryan K. Meals (VSB No. 40184)
Patrick M. Brogan (VSB No. 25568)
Philip N. Davey (VSB No. 14061)
DAVEY, BROGAN & MEALS, P.C.
101 Granby Street, Suite 300
Norfolk, Virginia 23514-3188
(757) 622-0100 (telephone)
(757) 622-4924 (facsimile)
bmeals@daveybroganpc.com
pbrogan@daveybroganpc.com
pdavey@daveybroganpc.com
Attorney for Defendants

CERTIFICATE OF SERVICE

I certify that on the 4th day of August, 2015, I electronically filed this Brief in Support of Motion to Dismiss Pursuant to Rule 12(B)(6) with the Clerk of Court using the CM/ECF system which will send notice of filing to the following:

Mr. James T. Lang
PENDER & COWARD. P.C.
222 Central Park Avenue. #400
Virginia Beach, Virginia 23462
Telephone: (757) 502-7326
Facsimile: (757) 502-7372
jlang@pendercoward.com
Counsel for Plaintiff

/s/

Bryan K. Meals (VSB No. 40184)
Patrick M. Brogan (VSB No. 25568)
Philip N. Davey (VSB No. 14061)
DAVEY, BROGAN & MEALS, P.C.
101 Granby Street, Suite 300
Norfolk, VA 23510-1636
Telephone: (757) 622-0100
Facsimile: (757) 622-4924
bmeals@daveybroganpc.com
pbrogan@daveybroganpc.com
pdavey@daveybroganpc.com
Counsel for Defendants