UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

307 CAMPOSTELLA, LLC,

Plaintiff

v. Case No. 2:15-cv-224

TIMOTHY J. MULLANE,

SIX M, LLC,

AMERICAN MARINE GROUP, INC.

AMERICAN MARINE GROUP, LLC

DOMINION MARINE GROUP, LTD

MULLANE BROS MARINE TRANSPORTATION, LLC

Defendants.

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS

The Plaintiff, 307 Campostella, LLC, by counsel, for its Brief in Response to the Defendants' Motion to Dismiss, respectfully states as follows.

Introduction

This case arises out of the Defendants continued operation of a semi-floating junkyard of rusting, dilapidated, aged ships, makeshift piers, and other abandoned scrap. The junkyard obstructs the channel of navigation, pollutes the environment, interferes with the waterfront businesses operated by the defendants' neighbors, and devalues Plaintiff's property. The Plaintiff's Complaint seeks various remedies provided by Virginia common law, as well as two federal environmental acts that allow citizens to bring enforcement actions when government agencies decline to act. The Defendants contend they can act with impunity.

A. The Clean Water Act, 33 U.S.C. § 1251 et seq. (the "CWA")

Congress passed the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Decker v. Northwest Envtl. Def. Ctr., 133 S. Ct. 1326, 1331 (2013) (citing 33 U.S.C. § 1251(a)). "To that end, the CWA prohibits the discharge of pollutants into navigable waters." Precon Dev. Corp. v. United States Army Corps of Eng'rs, 633 F.3d 278, 287 (4th Cir. 2011) (citing 33 U.S.C. § 1311(a)).[1]

The CWA imposes strict liability for violations of its standards. Am. Canoe Ass'n v. Murphy Farms, 412 F.3d 536, 540 (4th Cir. 2005). Discharge of pollutants without a permit may result in civil penalties up to $25,000.00 per day for each violation, with civil penalties payable by Defendants to the United States being part of the relief Plaintiff seeks in this action. 33 U.S.C. § 1319(d). The CWA provides "certain exceptions to its prohibition of 'the discharge of any pollutant by any person'", namely that a person wishing to discharge a pollutant into the water has the ability to obtain a permit prior to doing so. Rapanos, 547 U.S. 715, 723 (2006) (citing 33 U.S.C. § 1311(a)). The Rapanos Court explained that pollutants fall into two families, the first being "traditional pollutants" (any pollutant that naturally washes downstream) and the second being "fill material" which the Rapanos Court characterized as a pollutant discharged into the water "for the sole purpose of staying put" and noting that fill material "does not normally wash downstream." Rapanos, 547 U.S. at 723 & 743-745. The Rapanos Court goes on to explain that the CWA provides two separate permit programs, one for each family of

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[1] "[T]he Clean Water Act is a broadly worded statute." W. Va. Highlands Conservancy v. Huffman, 625 F.3d 159, 165 (4th Cir. 2010) (citing Rapanos v. U.S., 547 U.S. 715 (2006)). The terms "discharge of a pollutant" and "pollutant" in Section 1311(a) are "defined broadly". Rapanos, 547 U.S. at 723. "The plain text bears this point out, declaring that 'the discharge of *any* pollutant by *any* person shall be unlawful.'" W. Va. Highlands Conservancy, 625 F.3d at 165 (citing 33 U.S.C. § 1311(a). "'Any' is a powerful statutory term. The Clean Water Act uses it frequently." Id.

pollutant. Id. at 743-745. Persons wishing to discharge traditional pollutants into the water, such as those pollutants at issue in Count VII of this action, must apply for a NPDES permit issued pursuant to 33 U.S.C. § 1342. Id. Persons wishing to discharge fill material into navigable waters, such as the pollutants at issue in Counts IV through VI of this action, must obtain a permit from the U.S. Army Corps of Engineers pursuant to 33 U.S.C. §1344. Id. The Defendants have no CWA permits of any kind.

B. The Resource Conservation Recovery Act 42 U.S.C. § 6901 *et seq.* (the "RCRA")

RCRA, enacted in 1976, together with the 1984 amendment, created a program that, as Judge Friedman wrote for this Court, "establishes a framework for the management of solid and hazardous wastes designed to minimize threats to human health and the environment." U.S. v. Domestic Indus., Inc., 32 F. Supp. 2d 855, 863 (E.D. Va. 1999). The RCRA has two programs, one for hazardous waste, and another for solid waste. For hazardous waste management, the act establishes a cradle-to-grave regulatory program. Goldfarb v. Mayor & City Council of Baltimore, 791 F. 3d 500 ___, 2015 U.S. App. LEXIS 11320, *1 (4th Cir. Md. 2015). There is no cradle-to-grave regime for solid waste in RCRA but, for both hazardous waste and solid waste, RCRA aggressively seeks to eradicate open dumps, 42 U.S.C. § 6945, and aggressively directs the flow of both types of wastes, to an appropriate "sanitary landfill" for disposal, 42 U.S.C. § 6944.

Although the EPA is responsible for promulgating regulations to implement the provisions of RCRA, the administration and enforcement is delegated to the individual states. See 42 U.S.C. § 6926(a)(providing for state administration and enforcement of the "cradle to grave" hazardous waste program upon approval from EPA); 42 U.S.C. § 6945(c) (providing for

state administration and enforcement of the solid waste program including permitting process for the location, design, and operation of landfills upon approval from EPA).

Counts I and II

The parties have filed a stipulation of dismissal with regard to Counts I and II.

Count III states a claim for relief under RCRA

Plaintiff alleges in Count III that Defendants' use their pier/storage facility to dispose and/or store solid waste without a permit, or they use it as an open dump, in violation of RCRA, the regulations EPA developed to implement RCRA, and the Virginia statutes and regulations that the Commonwealth adopted and made effective pursuant to RCRA. Plaintiff sufficiently alleges citizen suit actions pursuant to both 42 U.S.C. §§ 6972(a)(1)(A) and 6972(a)(1)(B).

The Fourth Circuit last month explained the operation of §§ 6972(a)(1)(A) and 6972(a)(1)(B) in the Goldfarb decision:

> Although the Administrator of the EPA has chief responsibility for implementing and enforcing RCRA, "private citizens [can] enforce its provisions in some circumstances." Meghrig, 516 U.S. at 484 (citing 42 U.S.C. § 6972). In relevant part, § 6972(a) provides that "any person may commence a civil action on his own behalf--"
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> (1)(A) against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to [RCRA]; or
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> (B) against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment[.]
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> "Thus, a suit pursuant to subsection (a)(1)(A) must be based on an ongoing violation, whereas a suit under (a)(1)(B) may be predicated on a [qualifying] past [or present] violation." Sanchez v. Esso Standard Oil Co., 572 F.3d 1, 7 (1st Cir. 2009) (emphases added); see discussion infra Section IV.A. As their plain language indicates, each subsection contains different elements and targets somewhat different conduct.
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> Subsection (a)(1)(A) authorizes so-called "permitting violation claims" to be brought against a defendant who is alleged "to be [currently] in violation" of a

> RCRA-based mandate, regardless of any proof that its conduct has endangered the environment or human health. The permit, etc., subject to suit under subsection (a)(1)(A) can be either a state or federal standard that became effective pursuant to RCRA. See § 6972(a)(1)(A); Ashoff v. City of Ukiah, 130 F.3d 409, 411 (9th Cir. 1997) ("[I]f state standards 'become effective pursuant to' RCRA, a citizen can sue in federal court to enforce the standard."). This is so because RCRA "authorizes the states to develop and implement their own hazardous waste management scheme[s] 'in lieu of the federal program,'" Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 863 (4th Cir. 2001) (quoting 42 U.S.C. § 6926), so long as the state system is at least the "equivalent" of the federal program. § 6926(b). Maryland is authorized to operate such a parallel regulatory system, and has adopted the statutory and regulatory framework to do so. See Notice of Final Determination on Maryland's Application for Final Authorization [under RCRA], 50 Fed. Reg. 3511 (Jan. 25, 1985). To remedy a subsection (a)(1)(A) violation, the district court has authority to enforce the "permit, standard, regulation, condition, requirement, prohibition, or order" at issue. § 6972(a).
>
> At the same time, subsection (a)(1)(B) authorizes so-called "imminent and substantial endangerment" claims to be brought against a defendant whose conduct -- whether ongoing or purely in the past -- "may" now pose an "imminent and substantial endangerment to health or the environment." In contrast to claims brought under subsection (a)(1)(A), claims under subsection (a)(1)(B) may be brought regardless of whether the plaintiff can demonstrate that the defendant's actions violated a specific RCRA-based permit, etc. See AM Int'l, Inc. v. Datacard Corp., 106 F.3d 1342, 1349-50 (7th Cir. 1997). The district court has authority to restrain any person who has "contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" referenced in subsection (a)(1)(B). § 6972(a). Lastly, to remedy a violation of either subsection, the district court has authority "to order [a defendant] to take such other action as may be necessary." § 6972(a).

Goldfarb v. Mayor & City Council of Baltimore, 791 F.3d 500, 2015 U.S. App. LEXIS 11320 (4th Cir. 2015).

Defendants mistakenly argue the Plaintiff's claim fails under § 972(a)(1)(A) because, according to Defendants, Plaintiff has failed to allege an ongoing violation with respect to the Defendants' mismanagement of solid waste at the pier/storage facility. The Defendants overlook paragraph 45, for example, where the Plaintiffs allege that the Defendants' illegal activities continue "up to and including the present time." Paragraph 46 is replete with allegations of an ongoing violation ("pollution and contamination is carried away by wind and rain . . . is released

into the waterway"). So too the allegations in paragraph 48 ("defendants are operating a facility") and 51 ("defendants are operating an open dump"). The Complaint states well-pled facts that establish the ongoing violation. These facts, and the reasonable inferences flowing therefrom, must be accepted as true at this stage of the proceedings. Nemet Chevrolet v. Consumeraffairs.com, 591 F.3d 250, 253, (4th Cir. 2009). There is no need to plead the words "ongoing violation", as this is a legal conclusion that flows from the above cited well-pled facts in the Complaint.

The Defendants next argue that the pleading fails under § 6972(a)(1)(B) because there is no allegation of imminent and substantial endangerment. At page 7 of their brief, the Defendants seemingly suggest conditions are great at the waterway because no one has taken any action to hold Defendant Tim Mullane accountable for the pollution he is causing. Quite to the contrary, paragraphs 3 and 4 allege that Plaintiff contacted Defendant Mullane many times in 2013 and 2014, and brought this legal action as a last resort after Mullane refused to voluntarily stop polluting the river. Defendants likewise overlook the allegations in paragraph 3 describing a half dozen civil and criminal prosecutions, from 2007 to 2014, that local and state authorities brought to successful conclusion against Mullane for his polluting activities in the waterway. To be sure, none of these previously adjudicated environmental crimes and violations were predicated on the RCRA claims set forth in Count III. They do, however, dispel any notion of environmental stewardship on Mullane's part and, by inference, on the part of the Defendants with whom he so closely associates himself, particularly so given that local government authorities describe the waterway as "the worst cove" in the City of Norfolk (Compl. at ¶ 11).

The Plaintiff is under no duty to plead the legal conclusion "imminent and substantial endangerment". Instead, the Plaintiff's obligation at this stage of the proceedings is to allege a

set of well-pled facts from which the legal conclusion may be inferred. In evaluating whether the Complaint describes pollution and contamination that amounts to imminent and substantial endangerment, the "common law of public nuisance" properly serves as a guidepost. Middlesex County Bd. of Chosen Freeholders v. New Jersey, Dep't of Environmental Protection, 645 F. Supp. 715, 722 (D.N.J. 1986) (citing legislative history for 42 U.S.C. § 6972(a)(1)(B)). The Court there wrote that "The statute, therefore, incorporates legal theories used to assess liability for creating a public nuisance and to determine the appropriate remedies utilized in common law for such terms as 'imminent' and 'substantial.' The statute is, however, to be read more liberally in terms of determining who is contributing to the substantial endangerment." Id. See also, Singer v. Bulk Petroleum, 9 F. Supp. 2d 916 (N.D. Ill. 1998) (holding that facts alleged were sufficient). Section 6972(a)(1)(B) prefaces the imminent and substantial endangerment requirement with the permissive "may present". The statutory language therefore requires nothing more than a pleading of facts supporting the reasonable inference that the Defendants' activities "***may present*** an imminent and substantial endangerment". Id. (emphasis added).

The Complaint at paragraph 44 alleges that the Defendants are mismanaging an extremely large volume of solid waste – 4,000 cubic yards. For comparison, a typical dump truck holds 18 cubic yards; thus the Defendants' solid waste pile would fill more than 220 dump trucks. The contents of the Defendants' waste pile are creosote soaked timbers, discarded mechanical and electrical equipment, discarded paint cans, discarded drums, trash and rubbish (Compl. at ¶ 44). An example of one small part of this very large waste pile is seen in the rusted metal drums depicted in the photograph on page 23 of the Complaint. The photo, along with the Defendant Mullane's previous convictions for environmental crimes, typifies the Defendants' poor waste management practices. The decayed condition of these drums is apparent, as is the

haphazard care afforded them, and the manner in which these drums are at the mercy of the elements. These drums are typical of those used to store commercial or industrial waste chemicals. It is alleged in paragraph 46 that all of the contents of the Defendants' massive waste pile are exposed to the elements, that they deteriorate as a result, with the consequence that "pollution and contamination is carried away by wind, rain, and other forces of nature after which the pollution and contamination is released into the waterway, and hence into the Elizabeth River and the surrounding environment." The "may present" threshold in the statutory text requires nothing more. Singer v. Bulk Petroleum, 9 F. Supp. 2d 916 (N.D. Ill. 1998).

Defendants next argue that Plaintiff's reliance on Virginia statute and regulations cited in paragraph 48 of the Complaint is improper. Defendants miss the point when they suggest that Plaintiffs proceed on the theory that there is an implied private right of action under the State solid waste management laws and regulations cited therein. Plaintiffs invoke these provisions of State law because they are a "standard, regulation, condition, requirement, [or] prohibition . . . which has become effective pursuant to" RCRA. 42 U.S.C. § 6972(a)(1)(A). As such, Plaintiff may hold Defendants accountable for their violation of these requirements in this citizen's suit. Ashoff v. City of Ukiah, 130 F.3d 409 (9th Cir. 1997); Cameron v. Peach County, 2004 U.S. Dist. LEXIS 30974 (M.D. Ga. June 28, 2004).

Virginia, like other states, was required by RCRA to adopt standards for the location, design, and operation of its solid waste landfills. 42 U.S.C. § 6945(c); Resource Invs. v. U.S. Army Corps of Engrs., 151 F. 3d 1162, 1167 (9th Cir. 1998). A required element of the plan that Virginia submitted to EPA was the avoidance of waste piles, such as the one described in Count III, by imposing a mandatory permit requirement on all persons who operate a landfill or other facility for disposal, treatment or storage of nonhazardous waste. Id. The mandatory permit

requirement to which Virginia was required by RCRA to adhere, which requirement these Defendants are flouting, finds expression in Va. Code § 10.1-1408.1(A), in 9 VAC 20-81-40(A) through (C), and 9 VAC 20-81-400(A), the provisions cited in paragraph 48 of the Complaint. The permit requirement is the mechanism that forces persons such as these Defendants to dispose of solid waste appropriately, at a properly maintained landfill, as opposed to accumulating it in a massive waste pile at the side of a river. The centrality of the permit requirement is evident from the statutory text at 42 U.S.C. § 6945(c) and from the further fact that the EPA expressly refers to it in the approvals that it issued for the Virginia program. See, Virginia: Final Partial Program Determinatin of Adequacy of State Municipal Solid Waste Landfill Permit Program, 58 Fed. Reg. 6955, 6956 (Feb. 3, 1993) ("Virginia's MSWLF permit program has the authority to issue permits"); see also, Virginia: Partial Program Determination of Adequacy of Commonwealth's Municipal Solid Waste Landfill Permit Program, 59 Fed. Reg. 15,201, 15,202 (March 31, 1994) (same).

Finally, Defendants correctly note that Plaintiffs may not recover compensatory damages in a RCRA citizen suit and Plaintiff makes no such claim. Rather, the Plaintiffs' claim for compensatory damages relies on the allegations in Count VIII.

The Defendants' Motion to Dismiss Count III must be denied.

Counts IV, V and VI

Counts IV through VI in this action allege that the Defendants discharged pollutants - the stationary category known as "fill material"- into the Elizabeth River in Norfolk without having obtained the required CWA Permits.

As Magistrate Judge Miller wrote for this Court in 2009, a plaintiff establishes a prima facie violation under CWA section 33 U.S.C. § 1311(a), for discharging fill material without a permit, by alleging "that (1) Defendants are persons who controlled, performed, or were

otherwise responsible for the activities at issue; (2) Defendants discharged pollutants; (3) from a point source; (4) into streams or wetlands that qualify as jurisdictional 'waters of the United States;' (5) without a permit or other statutory authorization for such discharge". U.S. v. Bedford, 2009 U.S. Dist. LEXIS 133289, *15 (E.D. Va. Feb. 12, 2009) (citing 33 U.S.C. §§ 1311(a), 1344(a), 1362 (2009) (definitions); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983); United States v. Lambert, 915 F.Supp. 797, 802 (S.D. W.Va. 1996)), adopted, 2009 U.S. Dist. LEXIS 44126, *1 (E.D. Va. May 22, 2009) (Judge Smith).

The Defendants do not challenge– and implicitly (and necessarily) concede - that the allegations in the Complaint adequately plead all requisite elements of a prima facie case other than 'discharge of a pollutant." In arguing that the "discharge of a pollutant" element has not been alleged, the Defendants advance an unnaturally narrow interpretation of the term "fill material". Defendants assert that "the pier/storage facility and their grounded vessels are not and can never be 'fill material" (Defs.' Br. in Supp. MTD at 10).

For example, as to Count IV, Defendants contend that the 200 foot long former barge and current pier/storage facility that they pushed up onto the shoreline of the Elizabeth River, and that now occupies one-quarter acre in a mudflat, is not "fill material" within the meaning of the CWA. They similarly contend as to Count V that the 261- foot long vessel they pushed up onto the shoreline of the Elizabeth River, and that occupies one-quarter acre of mudflat and river bottom, and left in place for many years, is not "fill material". Finally, as to Count VI Defendants contend that the 245-foot long vessel they grounded on a mudflat at the cul-de-sac at the south end of the waterway in the Elizabeth River, and that now occupies one-half acre of mudflat and river bottom, and left in place for many years, is not "fill material".

As a whole, the Defendants motion to dismiss is based entirely upon one predicate – that a "a vessel, including a dumb barge, cannot be 'fill material' under the terms of CWA and its implementing regulations" (Defs. Br. in Supp. MTD at 10). Defendant Mullane misleads the Court when he states – categorically - that "vessels are not and can never be 'fill material." Id. With a resume that includes the sinking of "about 60 vessels" to create artificial reefs, including the sinking of the 563' ex-USS ARTHUR W. RADFORD which is the longest ship ever reefed, this Defendant well knows that, depending on the use to which a vessel is put, a vessel certainly can qualify as fill material. See, Smith, Reefing a Navy Destroyer, On the Waterfront (Aug. 8, 2011) (http://www.workboat.com/on-the-waterfront/reefing-a-navy-destroyer) (site visited Aug. 25, 2015). The National Fishing Enhancement Act of 1984, 33 U.S.C. §§ 2101 to 2106, confirms that a ship is "fill material" when it is deliberately sunk for the purpose of creating an artificial reef in the waters of the U.S. 33 U.S.C. § 2104(a) ("In issuing a permit for artificial reefs under . . . section 404 of the Federal Water Pollution Control Act [33 U.S.C.S § 1344] . . . the Secretary of the Army shall . . ."). The waters of the U.S. includes the inland waters and the ocean waters out to the 3-mile limit. 33 U.S.C. § 1362(12), (7) & (8).

The Defendants' argument is further contradicted by the very regulations they cite. The Defendants acknowledge that discharging "fill material" without a permit is illegal. Defs.' Br. in Supp. MTD at 10-11. And, the Defendants' admit that the regulations define "fill" broadly to include "materials used to create any structure or infrastructure in the waters of the United States." 33 C.F.R. § 323.2(e)(2). Indeed, the Defendants themselves state that

> 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 ...artificial islands ... breakwaters, and revetments ...artificial reefs.

Defs.' Br. in Supp. MTD at 11 citing 33 C.F.R. § 323.3(f) (emphasis added).

Abandoned ships are quite frequently used for artificial reefs – and such ships are undisputedly "fill material" for which a permit is required. Thus, Defendants cannot dispute that ships can be fill. Accordingly, the only question is, are the ships at issue in this case fill. Certainly, the Complaint alleges that they are – and on a motion to dismiss that should end the inquiry.

Furthermore, there is nothing inherently incredible about the allegation that the ships at issue are "fill." If the Defendants wanted to build a pier on the wetlands and mudflats in the waterway they would need a permit for 'fill.' Nor could they circumvent the permitting requirement by constructing the facility on the shore and then dropping it on the wetlands and mud – there is no question that such action would constitute a "discharge of a pollutant [fill material]." The Defendants' actions – taking a derelict vessel and intentionally running it aground into wetlands so that it can be used as a pier – is no different than taking steel and concrete and constructing a pier.

After all, the Complaint's factual allegations describe in some detail how the structures that the Defendants' placed in the water alter the physical and biological integrity of the water (Compl. at ¶ 57 (pier/storage facility); ¶ 64 (ex-USS YRST-2); ¶ 71 (BARGE ATC 12000)).[2]

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[2] Paragraph 57 of the Complaint explains how the Defendants' unlicensed pier/storage facility destroys marine life, constituting man-made alteration of the biological integrity of the water and quite certainly affecting chemical and physical integrity of the water as well. Specifically:

> The large unlicensed pier/storage facility compresses the mudflat underneath with its weight, with adverse impact to benthic organisms and other aquatic life. This large unlicensed pier/storage facility is likewise preventing sunlight from reaching approximately 10,000 square feet (or one-quarter of an acre) of the mudflat, with adverse impact to photosynthetic bacteria and benthic microalgae beneath the facility. These are significant adverse impacts to the functions and values of the mudflat and the waterway. This facility pollutes the waterway by causing a degradation to the physical, chemical and/or biological properties of the waters of the inlet.

These physical and biological alterations of the water are "pollution" (CWA (33 U.S.C. § 1362(19)) and, hence in the absence of a permit, are prohibited by 33 U.S.C. § 1311(a). Insofar as the Defendants' pollution is of the type that "stays put" (Rapanos, 547 U.S. at 744), the Defendants' sole option for compliance with 33 U.S.C. § 1311(a) is to obtain the type of permit that is available for the discharge of fill material (33 U.S.C. § 1344). They are ineligible for the other type of permit, namely the permit under the NPDES program (created pursuant to 33 U.S.C. § 1342) because the Defendants' pollution will not "wash downstream" Rapanos, 547 U.S. at 744. The terms "fill material" and "discharge of fill material" are not defined in the CWA itself, but in the implementing regulations. The agencies charged by Congress to administer 33 U.S.C. § 1344 – the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers – promulgated a final rule defining those terms in 2002. See, Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 67 Fed. Reg. 31,129 (May 9, 2002), codified at 33 C.F.R. § 323.2(e). "Fill Material" is thus defined as follows:

> (1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:
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> (i) Replacing any portion of a water of the United States with dry land; ***or***
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.
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> (2) Examples of such 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.
>
> (3) The term fill material does not include trash or garbage.

33 C.F.R. § 323.2(e) (emphasis added).

The Complaint contains similar allegations for the ex-USS YRST-2 at ¶ 64 and that BARGE ATC 1200 at ¶ 71.

The aerial photo at page 10 in the Complaint (Compl. at ¶ 29) shows the position of the Defendants' pier/storage facility on the shore of the waterway, at the location where the Defendants placed it several years ago (Compl. at ¶¶ 25, 45-46), this being the same spot where the facility was located when the Complaint was filed in May of this year (Compl. at ¶ 29). The two ground level photos at page 26 of the Complaint (Compl. at ¶ 55) show this same structure aground on the mudflat at this same location. The Complaint alleges what is obvious from the photos: This mammoth 200 foot by 50 foot structure (Compl. at ¶ 14), large enough to house 4,000 cubic yards of solid waste (Compl. at ¶ 44), changes the bottom elevation of the waterway (Compl. ¶ 56) which fact makes it "fill material" on the plain language of the definition ("[T]he term fill material means material placed in waters of the United States where the material has the effect of . . . Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii)).

The Defendants do not dispute that the unlicensed pier/storage facility in Count IV changes the bottom elevation of the waterway. Instead, they argue that the rule contains language that somehow excepts their structure from the operation of the rule, an argument belied by language in the rule that expressly creates two exceptions, neither of which have any conceivable application to the Defendants' pier/storage facility nor their grounded vessels.

The Defendants seek to deflect the Court's attention away from the presence of the two exceptions in the rule when, at page 10 of their brief, they selectively omitted language when they furnished this Court with their quoted version of the rule. They misleadingly omitted the phrase at the beginning of the rule which reads "Except as specified in paragraph (e)(3) of this section" and they likewise failed to include the language in paragraph (e)(3) of the rule that

describes the two exceptions, these being trash or garbage, neither of which would apply to the structures that the Defendants placed in the waterway.[3]

When interpreting the definition of "fill material" this Court should follow the rule of construction that, when certain exceptions are explicitly enumerated in a statute (or by extension, a regulation), additional exceptions are not to be implied in the absence of contrary intent on the part of the drafters. See, e.g., TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001) (citing Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980)). To do otherwise distorts the plain language in the text of the rule. Id. Here, the drafters could not possibly have meant to exclude the Defendants' pier/storage facility and their grounded vessels from the definition of fill material. After all, the 33 U.S.C. § 1344 permit is the only CWA compliance option the Defendants have for placing these three structures where they have placed them in the waters of the United States.

The Defendants nonetheless make the disfavored argument that an additional exception for "a pier/storage facility and/or grounded vessel" (Defs.' Br. in Supp. MTD at 12) should be implied into the rule, with this implied exception being in addition to the two exceptions the drafters expressly codified in the text of the rule. For support the Defendants imaginatively rely on the illustrative list in subsection (e)(2) of the rule which is prefaced with a proviso confirming that the list is not exhaustive: "Examples of such fill material include, but are not limited to . . . ." 33 C.F.R § 323.2(e)(2) (emphasis added).[4] Thus, even if the Defendants' pier/storage facility and their grounded vessels are absent from the list, this hardly matters, as the list is illustrative only. Their structures have changed the bottom elevation of the waterway, making these objects

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[3] As discussed infra at page 16, if the ships are "trash or garbage" they are still pollutants whose discharge is regulated, they are just not 'fill' for which the Defendants could obtain a permit.

[4] See, 67 F.R. 31,129, 31,132 ("...the preamble made it clear that these [examples] were merely illustrative"...and..."today's final rule adopts a more general effects-based approach for defining 'fill material'").

fill material, and the addition of an illustrative list in the rule does not alter the conclusion that these objects are fill material.

The Defendants have a further difficulty because even the illustrative list mentions "materials used to create any structure or infrastructure" as an example of fill material, Id., which phrase alludes to the pier/storage facility and the Defendants' grounded vessels, as each is a structure or infrastructure. Perhaps realizing the jeopardy imposed by the definition's reference to "structure or infrastructure" as fill material, Defendants strain to distinguish a structure from the raw materials used to build a structure. They seemingly argue that raw materials are "fill material" but the structure built from those raw materials is not. That the CWA would prohibit pollution caused by component parts but would not prohibit the greater pollution caused by a large structure built from those parts is counter intuitive at best. The distinction fails in the face of Justice Scalia's observation in Rapanos when he wrote for the plurality that "fill material" is a pollutant discharged into the water "for the sole purpose of staying put" and that "fill material" "does not normally wash downstream." 547 U.S. at 744. Whether in the case of the pier/storage facility or the grounded vessels, the raw materials used to build those objects, and the structures themselves, all have the characteristic of "staying put" and none of them would "normally wash downstream", hence all of them – the components and the whole – are fill material.[5]

For completeness we give brief response to the Defendants' remaining arguments.

They seek to paint a parade of horribles by comparing what they have done here – pushed a mammoth structure up onto a shoreline and used it as a pier/storage facility for many years, and grounded two mammoth vessels, leaving them in place for many years – with an operational

[5] The Defendants argument with respect to illustrative lists, by reference to the definition of "discharge of fill material" in 33 C.F.R. § 323.2(f), is similarly unavailing.

vessel's incidental touching the bottom due to low tide or storm. The two examples differ in kind and so the one does not inform the other.

Defendants rely on Bragg v. Robertson, 72 F. Supp.2d 642 (S.D.W.V. 1999) for their argument that "fill material" is limited to "rock, sand, soil, etc." The court in Bragg said no such thing. Bragg instead provides an example of the thicket into which these Defendants plunge if they persist in their claim that the structures they placed in the water are not "fill material." The pollutant being discharged in the Bragg case was overburden or excess spoil. The court there held that, because this was "trash or garbage" it could not qualify as "fill material" and, hence, no permit under 33 U.S.C. § 1344 could be given to allow the discharge. 72 F. Supp. 2d at 657. Applied here, as explained previously in this brief, if these Defendants continue to argue that their structures are not fill they will find themselves with no avenue for obtaining a permit that would allow their pollution and, in so doing, consign themselves to perpetual violation of the prohibition in 33 U.S.C. § 1311(a). Resource Investments, Inc., v. U.S. Army Corps. of Engineers, 151 F.3d1162 (9th 1998), also cited by the Defendants, holds, as does Bragg, that the discharge is a pollutant which is ineligible to receive a 33 U.S.C. § 1344 permit because of the "trash or garbage" exception in the definition of "fill material".

The Defendants' Motion to Dismiss Counts IV to VI in the Complaint must be denied.

Count VII alleges a discharge of a pollutant from a point source sufficient to state a claim for relief for Defendants' violation of the CWA

As discussed in more detail above, the Clean Water Act prohibits "the discharge of any pollutant by any person" except in compliance with the CWA. 33 U.S.C. § 1311(a). The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from *any*

point source." 33 U.S.C. § 1362(12)(A)(emphasis added)[6]. The CWA's definition of "Point Source" expressly includes "vessel or other floating craft." 33 U.S.C. § 1362(14).

The Plaintiff alleges that the Defendants own or operate vessels (Compl. at ¶ 75), that are discharging bilge water, stormwater and other pollutants (Compl. at ¶¶ 76, 80) into a navigable Water of the U.S. (Compl. at ¶¶ 76, 80) without a permit as required by the CWA. (Compl. at ¶¶ 78, 81). Thus, Plaintiff pleads all of the requisite elements of a cause of action.

The Defendants concede that stormwater that is collected, channeled, and discharged from a "point source" is a "pollutant" as defined by the CWA. Defs.' Br. in Supp. MTD at 14. Defendants further admit that a "vessel or other floating craft" is a "point source." (Id. at 13). The Defendants seem to argue that "natural runoff" from vessels is exempt from the CWA – however, the Defendants cite no exemption – nor does any such exemption currently exist.[7]

The Defendants, perhaps, hope to rely on a prior regulatory exemption for discharges incidental to the normal operation of a vessel, which was contained in 40 C.F.R. § 122.3(a). However, the blanket exemption was vacated effective September 30, 2008 by the United States District Court for the Northern District of California. Northwest Envtl. Advocates v. United States EPA, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. 2006). The EPA subsequently promulgated regulations providing for a Vessel General Permit ("VGP") to regulate (and permit subject to the terms of the VGP) discharges from certain vessels. See Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel, 78 Fed. Reg. 21938 (April 12, 2013). The Defendants do not allege

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[6] As discussed in Footnote 1, supra, the word "any" is interpreted broadly in the CWA.

[7] The Defendants further ignore the allegation that stormwater and other pollutants "collect in the bilge" and that Defendants periodically "pump this bilgewater into the waterway." Compl. at ¶ 80. Thus, the Complaint alleges collection, channelization (in the pump) and discharge.

compliance with the terms of a VGP – nor could such a defense be raised on a motion to dismiss.[8]

The Complaint alleges all of the facts necessary to state a claim for a violation of the Clean Water Act, and therefore, the Defendants' Motion to Dismiss must be denied.

Count VIII properly alleges facts that constitute both a public and private nuisance

Nuisances are of two kinds -- public 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. White v. Culpeper, 172 Va. 630, 636, 1 S.E.2d 269, 272 (1939). Plaintiff has sufficiently alleged both public and private nuisance under state law and/or the general maritime law—public in that the Defendants have unreasonably obstructed navigation in a public waterway, and private because the nuisance directly diminished the value of Plaintiff's land. See Fugate v. Carter, 151 Va. 108, 112, 144 S.E. 483, 484 (1928).

Remarkably, the Defendants argue that Plaintiff failed to allege an obstruction to Plaintiff's reasonable and comfortable use of property.

[8] Indeed, *even if* the former exclusion had not been vacated by the California District Court, the exemption never applied to discharges from vessels not being actually operated "as a means of transportation" or when secured to a storage facility. Thus, on a motion to dismiss the Defendants could not rely on such a qualified exemption.

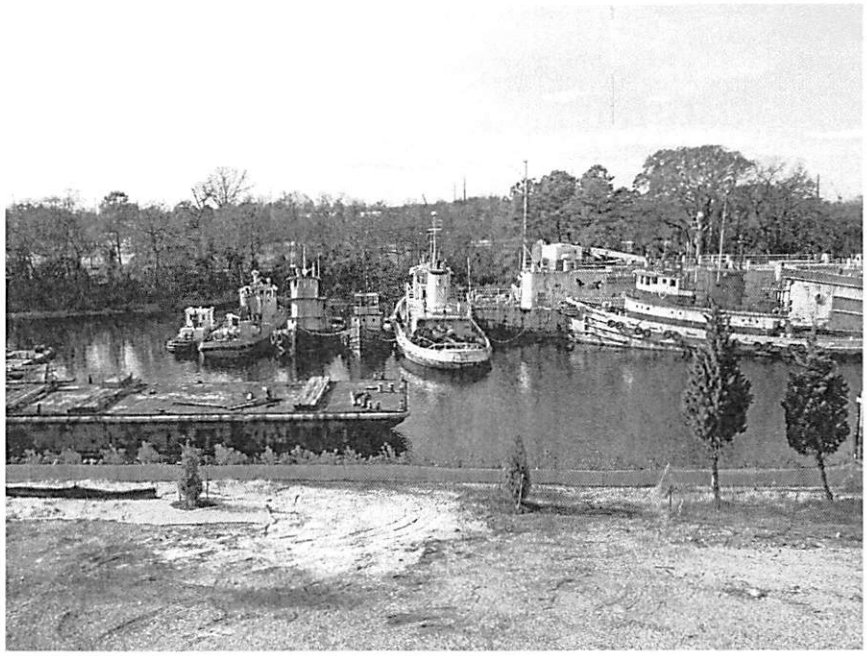
Paragraph 39 of the Complaint alleges (and depicts) the following:

The red box on the August 20, 2013 aerial photograph, immediately below, shows the channel completely obstructed at the non-bulkheaded portion of plaintiff's property (all of the vessels in the blockade except four are owned by defendants or their business invitees):

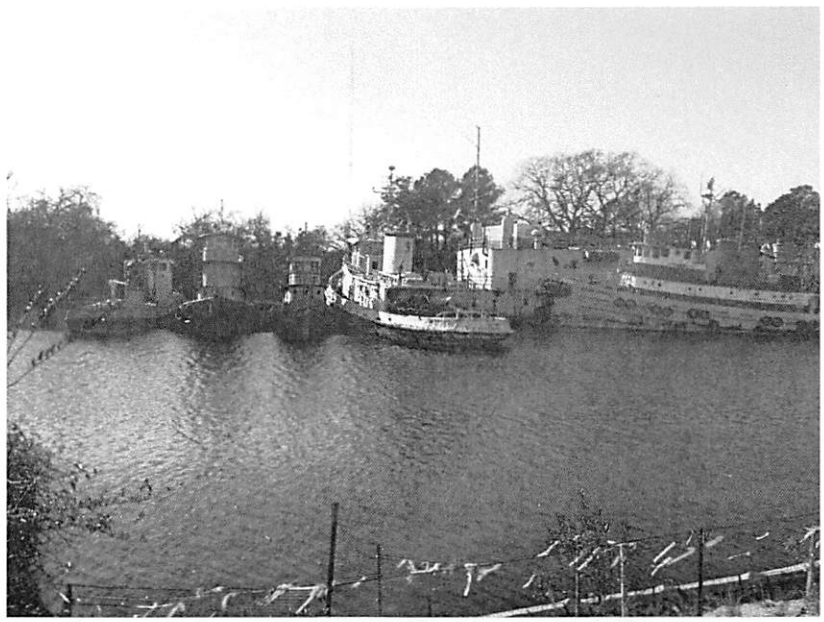
Paragraph 40 of the Complaint alleges and illustrates four instances of obstruction during periods of 2014-2015:

April 7, 2014: (complete obstruction in the channel at the non-bulkheaded portion of plaintiff's property / all vessels except two belong to defendants or their business invitees / this obstruction remained for at least seven days):

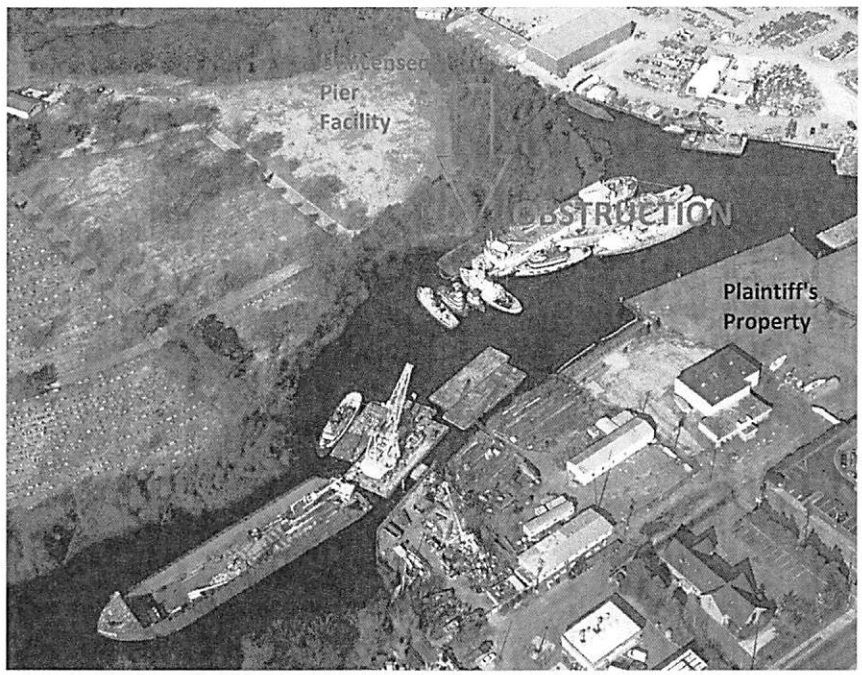
December 12, 2014 (50% obstruction in the channel at the non-bulkheaded portion of plaintiff's property / all vessels except two belong to defendants or their business invitees):



January 22, 2015 (50% obstruction in the channel at the non-bulkheaded portion of Plaintiff's property / all vessels except one belong to defendants or their business invitees):



March 18, 2015 (50% obstruction in the channel at the non-bulkheaded portion of Plaintiff's property / all vessels except three belong to defendants or their business invitees):



Furthermore, Paragraphs 35, 41 and 17 of the Complaint allege as follows:

The unlicensed pier/storage facility, and the vessels berthed there, occupy at least 64% of the channel directly in front of the plaintiff's bulkhead at all times. They occupy so much of the navigable channel, and their occupation is of such duration, as to practically impede and/or interfere with the navigation of other vessels in the waterway. (Compl. at ¶ 35).

The defendants' vessels and those of its business invitees, occupy 50% or more of the channel at the plaintiff's non-bulkhead property at all times. They occupy so much of the navigable channel, and their occupation is of such duration, as to impede and/or interfere with the navigation of other vessels in the waterway. (Compl. at ¶ 41)

These actions by Mullane and his co-defendants cause economic harm to 307 Campostella in the form of lost or reduced rents, and reduction in the value of the 307 Campostella property, in an amount in excess of $75,000.00. (Compl. at ¶ 17)

Virginia's courts have defined a private nuisance as "an activity which unreasonably interferes with the use and enjoyment of another's property." Adams v. Star Enter., 51 F.3d 417, 422, (4th Cir. 1995); citing, City of Newport News v. Hertzler, 216 Va. 587, 221 S.E.2d 146, 150

(1976). An occupant's right to the use and enjoyment of land is to be broadly construed. Id; citing, Bowers v. Westvaco Corp., 244 Va. 139, 419 S.E.2d 661, 665 1992). "The term 'nuisance' includes 'everything that endangers life or health, or obstructs the reasonable and comfortable use of property.'" Id., citing National Energy Corp. v. O'Quinn, 223 Va. 83, 286 S.E.2d 181, 182 (1982).

Relying entirely on Barnes v. Quarles, 204 Va. 414 (1963) and Bragg v. Ives, 149 Va. 482 (1927), Defendants claim that Plaintiff failed to allege two necessary elements of private nuisance: endangerment to "life or health" and "obstruction of the reasonable and comfortable use of property". The Defendants have mistaken the analysis undertaken by a court in its determination of the existence of a legal nuisance with "magic words" that must be specifically pled. Instead, Plaintiff must only allege facts that must at this stage of the proceedings be taken as true, along with all reasonable inferences flowing therefrom, which facts and inferences warrant the legal conclusion that the Defendants are engaging in an activity that interferes with the Plaintiff's right to the use and enjoyment of land. Plaintiff has sufficiently alleged such. In addition to the aforementioned allegations, Count VIII of the Complaint alleges:

> The navigable waterway adjoining the plaintiff's property belongs to the public and the defendants' unauthorized obstructions of that waterway, as described in Counts I and II[9], above, are a nuisance. (Compl. at ¶ 87)
>
> The access by water to and from the plaintiff's property is substantially impaired by the defendants' unauthorized obstructions and, as such, the nuisance interferes with the plaintiff's use of its property. (Compl. at ¶ 88)
>
> The Defendants' uncontrolled releases of pollution into the waterway, as described in Counts III through VII, are a nuisance. (Compl. at ¶ 89)

[9] The factual allegations of Counts I and II apply notwithstanding the dismissal of the causes of action set forth in Counts I and II.

Plaintiff also properly alleges a cause of action for private nuisance. The cases cited by the Defendants do not support its contention that Plaintiff failed to specifically plead elements of such cause of action. To the contrary, the question of whether or not the intrusion of such an establishment constitutes a legal nuisance must depend upon the facts and circumstances of each particular case. Bragg v. Ives, 149 Va. 482, 495, 140 S.E. 656, 660 (1927). A court must decide, whether the allegations, if taken as true, could create a physical annoyance constituting a legal nuisance. Id. at 498. In making such a determination, the court in Bragg recognizes that the term nuisance, in legal parlance, 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. Id. at 497. The Defendants have mistaken the foregoing analysis with "magic words" that must be specifically pled. See also, Barnes v. Quarles, 204 Va. 414, 417 (1963) ("the term "nuisance" embraces everything that endangers life or health, or obstructs the reasonable and comfortable use of property").

Lastly, Defendant argues that Plaintiff must allege both an endangerment to life or health and an obstruction of the reasonable and comfortable use of property, a contention that is not supported by law. Rather, Plaintiff must only allege facts sufficient to prove one or the other. In other words an activity which unreasonably interferes with the use and enjoyment of another's property constitutes a 'nuisance'. Newport News v. Hertzler, 216 Va. 587, 592 (1976).

The Court should deny Defendants' Motion to Dismiss Count VIII of the Complaint and grant the Plaintiff the relief sought thereunder.

Conclusion

For the foregoing reasons, Plaintiff respectfully requests this Court deny the Defendants' Motion to Dismiss Counts III, IV, V, VI, VII, and VIII of the Complaint, grant the Plaintiff the

relief as set forth in such Counts of the Complaint, and grant any such additional relief as the circumstances deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2015, I caused the foregoing Plaintiff's Brief in Response to Defendant's Motion to Dismiss be electronically filed with the Clerk of the Court using the CM/ECF system, which in turn will provide electronic notification of and access to such filing to the counsel of record in this matter who are registered on the CM/ECF system.

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