



Memorandum

Date: September 8, 2022
To: John C. Gillespie, Esq.
From: Robert G. Lamilla, Esq.
Re: Hainesport Township- Clean Water Act Letter

Background

The Township received a letter on July 26, 2022 from Deborah A. Plaia, Esq., a resident of Hainesport Township (the “Township”) in the Creekview development. The underlying subject of the letter is the development of houses in the Township and the developer’s plan to obtain an easement through land owned by the Township for the installation of a stormwater pipe, which will ultimately discharge into the Rancocas Creek. The Township has conditionally approved this plan to deal with the stormwater, provided that the developer obtain all relevant permits.

The letter intimated that the Township may be sued under the Clean Water Act (“CWA”), 33 U.S.C. §1251, et seq., if a discharge occurs from the outfall pipe and into the Rancocas Creek.

Question Presented

Does the developer’s plan to run a stormwater pipe through an easement on Township property expose the Township to liability under the CWA?

Discussion

The CWA in New Jersey is administered by the New Jersey Department of Environmental Protection under the Water Pollution Control Act (“WPCA”) N.J.S.A 58:10A-1, et seq. Under the WPCA, persons are prohibited from discharging any pollutant into the waters of the State without a valid New Jersey Pollutant Discharge Elimination System (“NJPDES”) permit.

The letter is correct in noting that without a proper permit, the “discharger” can face liability under the CWA and WPCA through an enforcement suit by the DEP or EPA as well as through citizen suits brought pursuant to 33 U.S.C. § 1365(a)(1). However, in this case, the Township is not a discharger, as the Township is merely allowing a stormwater outfall pipe to be installed within an easement and the approval of said pipe is conditioned upon the developer obtaining the proper permits from the DEP. The Township is not planning on taking ownership of the stormwater pipe nor is the Township planning to discharge into the pipe. Therefore, the Township will not incur liability as a “discharger” since the Township will only have a properly permitted pipe passing

COUNSEL WHEN IT MATTERS.SM

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through its property. By itself, having a pipe running through one's property does not give rise to liability under the CWA or WPCA.

For reference, liability under the CWA requires the establishment of following four elements:

1. the defendant is a "person" under the CWA;
2. the defendant is adding pollutants to the waters of the United States or State;
3. those pollutants are being released from a "point source" such as an outfall pipe; and
4. the defendant either does not have a permit for the discharge of pollutants from the point source, or the defendant does have a permit, but is violating the permit.

See 33 U.S.C. §§ 1311, 1342, 1362.

Additionally, the Township should already have a NJPDES MS4 permit as a Tier A municipality. The MS4 permit authorizes the discharge of stormwater from small municipal separate storm sewer systems.

Based on the circumstances present here, the Township does not appear to have liability under the CWA by virtue of a stormwater pipe passing through an easement on Township property.

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