

POTW Liability When Acting as “Landlord”

QUESTION

The following question from a NACWA member agency was distributed to the Legal Affairs Committee via e-mail on March 9, 2007:

“In *Metropolitan Water Reclamation District v. North American Galvanizing*, 473 F3rd 824 (1/17/2007), the Seventh Circuit Court of Appeals ruled in favor of the Plaintiff District that CERCLA Section 107 provides persons other than States, Tribes and the US with a remedy for cost recovery of expenditures for response to environmental contamination that are incurred consistent with the National Contingency Plan, irrespective of the fact the District is a potentially responsible party due to its ownership of the property in question. Essentially the same question has been taken under review on Writ of Certiorari by the United States Supreme Court in a case called *Atlantic Research v. United States*, which arose in the 8th Circuit (459 F3rd 827 (2006)).

The Supreme Court briefing has begun and argument will be held in late April. The member agency would like to have information on the following questions as it prepares its brief:

1. How common is it for water reclamation agencies to have real property ownership of lands that are not currently dedicated to actual water reclamation purposes or agency administration, i.e. does your agency have such property?
2. Are such properties ever leased to private companies or persons for commercial or industrial use?
3. Would the ability to get cost recovery from a federal court influence water reclamation agencies in favor of performing cleanup with their public funds?”

RESPONSES

NACWA received the following responses from members, organized by the state or city from which the response was sent.

California: The West County Wastewater District (WCWD) is a sanitary district in Northern California. It is organized under the Sanitary District Act of 1923. It owns and leases land to a private company. It also wheels most of its secondary treated effluent to East Bay Municipal Utility District (EBMUD). EBMUD provides tertiary treatment to that effluent and delivers it to the Chevron refinery for use in Chevron's cooling towers.

The WCWD owns and operates a POTW near the shore of San Francisco Bay. The WCWD's POTW has historically been located in a generally industrial area.

As land in California became more valuable, housing developments began to move closer to the WCWD's POTW. In 1991, the WCWD purchased 11 acres of land adjacent to its POTW with the intent of using that land as buffer against the inevitable increase

in residential developments in the area. Once escrow for the purchase closed, the WCWD entered a 20 year lease of its land to Color Spot, Inc. Color Spot is among the largest producers of potted plants in the U.S.

When the WCWD purchased the land, it caused Phase 1 and Phase 2 environmental assessments to be performed. The Phase 2 environmental assessment was used to establish the baseline for contamination on the property. Color Spot is responsible for everything in excess of that baseline. Periodic environmental inspections are performed.

Hampton Roads Sanitation District, VA: The Hampton Roads Sanitation District (HRSD) has real property not currently in use. Future pump station sites, buffer lands (surrounding plants) and land for future expansions of existing facilities.

HRSD has leased land on temporary agreements. Land lease for road improvement construction, an old truck terminal and a future pump station site is currently under lease for overflow parking at a hotel. Generally, surplus property is sold on the open real estate market.

HRSD maintains an emergency contingency fund in its operating budget for investigation and cleanup of spills into the sanitary sewer. When the spill source is located, HRSD requires the responsible party to reimburse its costs. Regarding cleanup of leased property, HRSD specifically addresses environmental damage in the lease. The tenant must agree to hold HRSD harmless and defend against any environmental damage. HRSD has also required tenants to post an insurance bond in order to lease property.