



To: Delaware Sea Grant

From: Terra Bowling, Research Counsel II, National Sea Grant Law Center, University of Mississippi School of Law

Re: Liability for Shellfish Harvest Closure Due to Sewage Spill (NSGLC-22-04-01)<sup>1</sup>

Date: January 19, 2022

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### **Advisory Summary**

Delaware Sea Grant contacted the National Sea Grant Law Center seeking information about whether shellfish farmers have legal recourse against the party responsible for releasing sewage in Rehoboth Bay that resulted in the temporary closure of oyster harvesting. The state may levy fines or file a claim for damages resulting from the spill, but the shellfish farmers would not receive payment as a result of that for any damages to the oyster crop. It is unlikely that the shellfish farmers would be able to meet the necessary legal standards to bring a claim for damages under tort law.

### **Background**

TJ's Plumbing and Heating, LLC was called to perform a sewage disconnect at Mariner's Cove, a mobile home community in Millsboro, Delaware. During the disconnection process, backpressure in the system resulted in sewage spilling into a canal that feeds into Rehoboth Bay.<sup>2</sup> The spill resulted in the Delaware Department of Natural Resources and Environmental Control (DNREC) issuing an emergency closure of commercial and recreational shellfish harvest of oysters, clams, and mussels in the Rehoboth Bay for 21 days. The harvest closure impacted both shellfish farmers and wild harvesters.

### **Environmental Laws**

If a sewage backup goes beyond private property and pollutants are released into waterways, state and federal environmental protection laws would apply. The Clean Water Act (CWA) prohibits "the discharge of any pollutant by any person," into waters of the United States from a "point source" without a National Pollutant Discharge Elimination System (NPDES) permit.<sup>3</sup>

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<sup>2</sup> Delaware Department of Natural Resources and Environmental Control, Environmental Release Detail, No. 16800 (Dec. 28, 2021), available at <https://apps.dnrec.state.de.us/derns/pub/ReleaseDetail.aspx?ReleaseID=2021-3863>.

<sup>3</sup> 33 U.S.C. §§ 1311(a), 1312. The CWA defines "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container,



State law also requires a NPDES permit for pollutant discharges. DNREC has been authorized to manage and enforce the NPDES program in Delaware and has various enforcement tools for permit violations, including issuing warnings or Administrative Orders with penalties.<sup>4</sup>

There is the possibility that the sewage spill could result in DNREC issuing a violation or fine under the CWA to either the sewage system operator or the plumber. From property listings, it appears that Mariner's Cove is on a public utility, which would have an NPDES permit. The discharge could be a violation of the utility's NPDES permit if the spill was caused by a backup from the municipal sewage system and not the lateral (private) sewage system. Alternatively, the plumber could be in violation of the CWA for discharging a pollutant into a navigable water body without a permit. However, the oyster farmers would not be reimbursed for any damage to the oysters from any fine levied by the state.

Under the "citizen suit" provision of the CWA, any citizen may bring a civil action in federal district court on his or her own behalf against any person, including the United States or a state or local government, who is in violation of an effluent standard or limitation, or who is in violation of an order issued by the EPA or a state with respect to an effluent standard or limitation.<sup>5</sup> However, there are heightened legal requirements for these types of suits, and it seems unlikely that the oyster farmers would meet these requirements. For example, the defendant must be in violation at the time the citizen suit is brought. As this appears to have been a one-time spill, it would not be considered an ongoing violation of the CWA. Additionally, a citizen suit is not permitted if the EPA or state is already diligently pursuing an action against the alleged violator. Thus, if the state pursues an enforcement action, the oyster farmers would be precluded from bringing suit. Finally, similar to above, any fines levied as the result of a citizens suit would go to the state and not the party who brought the suit.

### **Property Damage Claims**

If a sewage spill or backup causes damage to private property, the person or entity responsible for the spill could be liable for property damage. For example, if a municipal sewer system caused sewage backup in a private home, the city would likely be required to compensate the homeowner. Likewise, if a plumber performing work on private property caused a sewage leak, the plumber would be liable for any damages to the private property.

The Mariner's Cove sewage spill appears to have been caused by the contractor performing the disconnect. Legal actions against the contractor would likely be based in negligence. A negligence action against the responsible party is a potential avenue for the oyster growers to obtain compensation; however, it isn't clear that the shellfish farmers would meet all of the elements necessary for a negligence claim. For a negligence claim to be successful, a

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rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

<sup>4</sup> Code Del. Regs. 7201, *available at*

<https://regulations.delaware.gov/AdminCode/title7/7000/7200/7201.shtml#TopOfPage>.

<sup>5</sup> 33 U.S.C. § 1365(a).



plaintiff must prove three elements: 1) that the defendant owed a duty to the plaintiff; 2) the defendant breached that duty; and 3) the breach proximately caused injury to the plaintiff.

In this instance, the shellfish farmers would first need to show that the contractor owed them a duty of care. Generally, in Delaware, anyone who performs an affirmative act is under a duty to others to “exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.”<sup>6</sup> The contractor therefore had a duty to exercise reasonable care when performing the sewage disconnect to protect others from an unreasonable risk of harm. No Delaware cases were found on point, but a court could conclude that this duty extended to the shellfish farmers. If a court did find that the plumber owed the oyster farmers a duty of care, the farmers would then have to prove the other elements of a negligence claim. The shellfish farmers would be required to show the contractor failed to exercise reasonable care in performing the disconnect, thereby breaching their legal duty. Finally, they would have to demonstrate that they suffered harm or incurred damages through loss of the oyster crop.

Another theory of liability could be public or private nuisance. A public nuisance is “an unreasonable interference with a right common to the general public,” such as the right to clean public water.<sup>7</sup> An individual or group could bring a public nuisance claim if the nuisance interferes with their private right and their harm is greater than that to the general public.<sup>8</sup> In this instance, the oyster farmers could argue that the harm to their business was greater than the harm to the general public. A private nuisance is “something which interferes with the rights or causes annoyance or damage to the property of a particular person,” affecting an individual’s private right, which is distinct from common or public rights.<sup>9</sup> A private nuisance claim might be more difficult, as the oyster farmers would have to establish their property rights in the oysters prior to harvest. While the shellfish farmers hold leases, the leased area is state property that is held in trust for all citizens of the state of Delaware. Typically, shellfish farmers are granted the right to place oyster seed within their leased area and to harvest the oysters, but they do not have property rights in the traditional sense to the submerged lands or water above the oysters

There were no cases on point in Delaware on whether a third party could be liable for damages to oyster farmers, but there are other cases that might help illustrate how courts view shellfish farmer leaseholder rights. In “takings” claims—generally, when a government action takes private property without compensation—courts have considered whether oysters are in fact property of the leaseholders. For example, in Virginia, lessees of oyster grounds brought a takings claim against a city and sanitation district, alleging that discharges from a sewer system polluted the waters in which lessees raised their oysters.<sup>10</sup> The Virginia Supreme Court held that alleged discharge of pollutants by the city and sanitation district did not affect a property interest of lessees, as the lessees only had been granted the right to plant and propagate oysters. In 2004,

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<sup>6</sup> Murray v. Mason, 244 A.3d 187, 195 (Del. Super. Ct. 2020), modified (Jan. 5, 2021).

<sup>7</sup> Restatement (Second) of Torts § 821B.

<sup>8</sup> Artesian Water Co. v. Government of New Castle Cty., No. CIVIL ACTION 5106, 1983 WL 17986 (Del. Ch. Aug. 4, 1983).

<sup>9</sup> *Id.* at 23.

<sup>10</sup> [Johnson v. City of Suffolk](#), 299 Va. 364, 851 S.E.2d 478 (2020).



the Louisiana Supreme Court held that oyster farmers could not bring a takings claim against the state because they did not have the necessary property interest in the oysters.<sup>11</sup> Recently, however, the U.S. Court of Federal Claims heard a claim from Louisiana oyster farmers alleging that the U.S. Army Corps of Engineers' release of freshwater from a spillway resulted in a taking of their property.<sup>12</sup> The court concluded that the oysters are property and therefore the Louisiana shellfish farmers may be entitled to compensation if they can prove their property was taken by the release of freshwater from the spillway. A Delaware court may be influenced by these rulings, but they would not be bound by them.

Although these private tort claims may exist, it is unclear whether they would be successful. As noted above, the shellfish farmers may not meet the necessary legal standards to bring a claim for damages under tort law.

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<sup>11</sup> *Avenal v. State*, 886 So. 2d 1085 (La. 2004).

<sup>12</sup> [Campo v. United States](#), No. 20-44 (Dec. 23, 2021).