



Virginia Supreme Court Upholds Dismissal of Inverse Condemnation Case Over Wet Weather Issues

December 2020

In 2018, watermen with oyster beds in the Nansemond River sued the City of Suffolk and Hampton Roads Sanitation District (HRSD), alleging that they had intentionally designed and operated their stormwater system (Suffolk) and sanitary sewers (both) to discharge contaminants onto oyster beds (leased from the Virginia Marine Resources Commission), resulting in closures by the Virginia Department of Health. In 2019, the Suffolk Circuit Court dismissed the watermen's claims with prejudice. The Circuit Court granted HRSD's and Suffolk's demurrers, holding that the facts of a 1919 case from the Virginia and United States Supreme Courts were so identical to the current case that dismissal was required. The key point was that oyster leases from the Commonwealth to the watermen must be interpreted as being conveyed **subject to the risk of pollution** from upland sources.

The plaintiffs appealed to the Virginia Supreme Court, which heard arguments in November 2020. The thrust of the watermen's appeal was that the trial court relied on obsolete caselaw that predates many of today's environmental laws and regulations. In the early 1900s, watermen sued the City of Newport News for its discharge of untreated sewage that polluted their oyster beds and rendered their oysters unfit for consumption. The Supreme Court of Virginia dismissed the case on the grounds that their oyster bed leases were taken subject to the superior right of the Commonwealth and its political subdivisions to discharge refuse into state waters. *Darling v. Newport News*, 123 Va. 14 (1918). The watermen appealed to the United States Supreme Court, which agreed with the Virginia Supreme Court that the oyster bed lease is taken at the risk of the water's pollution. *Darling v. Newport News*, 249 U.S. 540 (1919).

On December 10, 2020, the Court issued an [opinion](#) affirming the Circuit Court's decision to reject the watermen's claims. This is an excellent result as an adverse opinion could have affected any locality with wastewater or stormwater infrastructure in some proximity to downstream oyster ground leases.