

Are You The Controlling Type?

If so, and you own property on which tenants engage in certain regulated activities, you should consider consulting a specialist for a little preventive care – legal, not medical. Controlling the activities of these tenants can draw enforcement against the property owner when the tenants' operations raise environmental compliance issues, as a recent federal case illustrates.



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The case involved a sportfishing group that sued an industrial park owner for Clean Water Act ("CWA") violations caused by discharges of polluted storm water. The fact that any pollutants in the storm water were put there by the tenants did not protect the landlord. The court held that "owners and/or operators who have sufficient control over a facility can be held liable under the CWA even if they do not themselves perform the industrial activities that create the pollutants in the storm water discharge." Here, the landlord owned and controlled the storm water drainage system from which the pollutants were released.

Operations requiring storm water permits are not uncommon, and can include transportation, food processing, and recycling businesses, as well as construction activities. The requirement can also apply to other operations on a case-by-case basis.

Moreover, this potential enforcement trap for landlords goes beyond CWA concerns. Owners who exert control over their tenants' waste management practices may also risk enforcement. In recent years, retail outlets like hardware stores, pharmacies, and even groceries have been targeted by hazardous waste enforcement actions. This is because many common products like drain cleaners, over-the-counter drugs, and hand sanitizers can be considered hazardous wastes under certain circumstances.

Thus, a tenant's business may not necessarily raise a red flag. Landlords should consider how monitoring protocols or proper lease provisions could provide protection from the environmental afflictions of their tenants and save the expense of a pound of cure.



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