

Green Building Law Update

Environmental Law and Sustainability for Business

Lawsuit over First LEED Platinum Building is Over

By Stuart Kaplow on December 13, 2015

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Image David Harp/ Chesapeake Bay Foundation

With an Order Of Judgment, in favor of Permapost Products Company against Weyerhaeuser Company filed on November 17, 2015, resolving the final third party claims, the more than 15 year old disputes and differences over the construction of the Chesapeake Bay Foundation's Philip Merrill Environmental Center, in Annapolis, Maryland, are over.

There is much to learn from this case involving the first ever LEED Platinum building.

I wrote an earlier bog post, *Litigation over First LEED Platinum Building Comes to an End*, when on July 23, 2015, parties in the lawsuit *The Chesapeake Bay Foundation, Inc., et al v. Weyerhaeuser Company, et al*, pending in the U.S. District Court for Maryland, filed a Stipulation of Dismissal with Prejudice following a confidential Settlement Agreement and Mutual Release. Because the settlement was confidential we did not know precisely how the case resolved. But Weyerhaeuser's third party action against Permapost was unaffected by the dismissal and was just tried to verdict.

In the spirit of Paul Harvey's "The Rest of the Story" radio program, the key players in this case were: Chesapeake Bay Foundation was the owner of the project. SmithGroup was the architect and responsibility for design. Clark Construction was the general contractor. Weyerhaeuser was the subcontractor that sup-

plied Parallams to Clark Construction for both interior and exterior use. Permapost had a subcontract to apply pressure-treated PolyClear 2000 preservative to the Parallams.

Parallams are a fabricated wood product made by gluing strands of second-growth trees together to form a larger and stronger engineered wood product.

One of SmithGroup's design elements for the project was the use of external Parallams. SmithGroup approved PolyClear 2000 as the preservative for the Parallams. Permapost treated the Parallams with PolyClear 2000, beginning in March of 2000, however, Permapost did not properly treat the Parallams to "refusal" as required.

Five years later, the Chesapeake Bay Foundation discovered that various exterior Parallams suffered from deterioration. And subsequently, the Foundation demanded that SmithGroup and Clark remedy the rot and deterioration by removing and replacing all of the exposed Parallams.

Clark asserted that it had costs to remediate the building in the amount of \$3,115,793.

In September 2014, the Chesapeake Bay Foundation, SmithGroup, and Clark asserted total damages suing Weyerhaeuser and others in the amount of \$9,687,816 arising from the damaged Parallams in the project.

The Chesapeake Bay Foundation, Clark, and SmithGroup completed the remediation of the building. And in June 2015, plaintiffs and Weyerhaeuser settled their claims against one another for payment to the plaintiffs in an amount which has been testified to in this case and, therefore, is no longer confidential, \$3 million, which has been paid to date, and an additional \$500,000 to be paid at a later date.

In a telling quote from the Honorable Paul W. Grimm's oral findings from the bench, after determining there were "design defects which exposed the end of each and every exterior use Parallam in that entire project" because they were cut and had holes drilled in them after being treated, "I find, given, one, the inappropriate use of Parallams as structural support without proper weather protection, plus I find that the specification by the architect based upon the recommendation of Weyerhaeuser and Osmose, but not Permapost, .. PolyClear 2000 was an inappropriate preservative for the conditions of the Chesapeake Bay Foundation."

The court concluded, "these beams would have failed if the PolyClear 2000 had been properly applied a year or two later, they would have failed well before they got around to doing any remedial measures at all." The judge said, "I find as a matter of law that causation has not been established. They have not shown that the breach of contract .. that what Permapost did caused the damages that led to the replacement." Whereupon the court denied the Weyerhaeuser third party claims entering "judgment in favor of Permapost on all counts."

And now you know the rest of the story.

At its core this was a case arising from an improperly specified material. The case instructs there is no more liability arising from green building versus other construction, but that the liability is different.

It should give architects pause, now more than ever, that specifying new or untried materials and products (that are often the keystone of sustainable building) comes with unique risks; and in this case PolyClear

2000 was specified even before the emerging era of expanded liability arising from environmental product declarations and health product declarations.

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