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ENVIRONMENTAL NOTES

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SUPREME COURT BLOCKS CLEAN POWER PLAN, BUT SCALIA'S DEATH CHANGES OUTLOOK ON ULTIMATE FATE

BY: CHANNING J. MARTIN

The U.S. Supreme Court has blocked implementation of President Obama's signature plan to address climate change pending a decision by the D.C. Circuit Court of Appeals on the plan's legality. The Clean Power Plan is being challenged by 29 states and dozens of corporations and industry groups. The decision is a bit of a slap in the face to the D.C. Circuit, which denied the request to stay the regulation less than a month ago. The Supreme Court's action is unprecedented: It's the first time it has ever blocked implementation of an environmental regulation before the D.C. Circuit has had a chance to consider the regulation on its merits.

The Supreme Court's decision was widely seen as an indication it was likely to strike down the rule regardless of how the D.C. Circuit rules. That likelihood changed in an instant on February 13 with the death of Justice Scalia. The February 9 vote to block the rule was 5-4, with all the conservative justices (including Scalia) voting in favor of blocking the rule and all the liberal justices voting against it. Justice Kennedy, ever the swing vote, voted this time with the conservative justices. All indications are that the next justice appointed to the Supreme Court will be the deciding vote on the whether the Clean Power Plan survives.

Under the Clean Power Plan, states are to put in place programs designed to reduce overall nationwide carbon emissions from existing power plants by 32% by 2030 compared to 2005 levels. Each state has been assigned individual interim and final CO^2 reduction goals and can choose among the programs and plans it will use to achieve them. States are required to submit their plans to EPA by September, 2016 (with the ability to obtain a two year extension), but that's now on hold until the D.C. Circuit, and ultimately the Supreme Court, rules on the merits of the case.

We noted in the August, 2015 edition of *Environmental Notes* that the odds were the Clean Power Plan will not survive. We pointed out that the Administration had no chance of getting Congress to pass legislation regulating greenhouse gas emissions, so it opted to proceed by issuing regulations based on existing authority. EPA says section 111(d) of the Clean Air Act gives it that authority, but our belief is that this "pushes the envelope" too far. If President Obama appoints the next justice, though, it seems likely that argument will be accepted and the regulation will be upheld.

It will be a long time until there is a final decision – likely 2017 at the earliest – and how things play out from here is anyone's guess. In the meantime, the decision to stay the rule is welcome relief to those opposed to it.

AMENDMENTS TO VIRGINIA HAZARDOUS WASTE REGULATIONS OFFER INCREASED FLEXIBILITY

BY: HENRY R. "SPEAKER" POLLARD, V

One of the most vexing aspects of hazardous waste management hinges on a very basic question: whether something is in fact a regulated hazardous waste in the first place. This fundamental issue often arises for recycled or reclaimed materials. These materials are important to manufacturers because they can have value as substitutes for virgin materials and because of lower costs of waste management. However, regulatory provisions and agency guidance about whether these materials must be managed as hazardous waste can be complicated and confusing.

Last year, EPA revised its hazardous waste regulations to provide greater clarity and flexibility on this issue, and Virginia has now incorporated those changes into the Virginia Hazardous Waste Management Regulations. The amendments create new categories of "hazardous secondary materials" eligible through case-by-case evaluation for relief from regulation as a solid waste and, therefore, as a hazardous waste. "Hazardous secondary materials" are spent materials, by-products, sludges and similar materials that, when discarded, would be identified as hazardous waste under existing regulations.

Nonwaste determinations may be submitted to EPA or

the Department of Environmental Quality (DEQ) to obtain confirmation that certain hazardous secondary materials are not "discarded," and therefore not solid wastes, and in turn not hazardous wastes. These non-waste determinations are particularly applicable to hazardous secondary materials that are either (a) "reclaimed in a continuous industrial process if the applicant demonstrates that the hazardous secondary material is a part of the production process and is not discarded" or (b) essentially indistinguishable from a product or intermediate and is not discarded.

In addition, a variance may be sought for hazardous secondary materials to be managed at a verified reclamation facility or intermediate facility where such management is not already addressed under a RCRA treatment, storage or disposal facility permit or interim status standards. The amendments also clarify that, to obtain a variance for partially reclaimed materials still needing further reclamation before full recovery is completed, the materials must be "commodity-like" in nature, legitimately recycled per EPA regulatory requirements, and meet several other specific criteria addressing distinct reclamation process, economic value, suitability as a substitute for a commercial product, true marketability of the reclaimed material, and prevention of loss of the reclaimed material.

The amendments still do not allow management of hazardous secondary material in land-based units. Also, these nonwaste determinations and variances are not permanent: they may be issued for terms not to exceed ten years to ensure they reflect current operations and management of these materials. Finally, notification of nonwaste determinations and variances must be provided to the EPA administrator in keeping with similar notification required for other forms of management of hazardous secondary materials.

32 Va. Reg. 1585 (Dec. 28, 2015)

BIG SURPRISE FOR BIG RIVER STEEL

BY: RYAN W. TRAIL

Think only environmental groups challenge permits? Think again. Big River Steel, LLC (BRS) proposed to construct a steel mill in northeast Arkansas and needed an air permit to operate it. The state issued the permit in 2013, but the permit was challenged administratively and in court by subsidiaries of Nucor Corporation, a competitor that owns and operates steel mills in the same county as the proposed BRS mill.

Nucor's court challenge to the permit was based on both procedural and technical grounds. Among other things, Nucor challenged BRS's use of a "representative" monitor, located 40 miles northeast of the construction site, to account for background air pollution in its air quality analysis. Nucor also challenged BRS's adjustment of data that were input into an air-dispersion modeling program. The adjustment resulted in the projected PM2.5 emissions to be 11.91 ug/m^3, just under the Federal standard of 12 ug/m^3.

The Court upheld the state's issuance of the permit. It found procedural flaws in Nucor's appeal (e.g., failure to raise certain claims during the public comment period), and it gave "great deference to the agency's expertise" in upholding the technical elements of the permit.

Although Nucor stated in its petition that it was seeking to protect air quality in the county for its workers, counsel for BRS pointed out that no environmental groups opposed the permit and that the only opposition came from Nucor, an obvious competitor. This case stands as a reminder to industry: environmental groups are not the only potential litigants lurking.

Court of Appeals Opinion (2015 Ark. App. 703)
Nucor Petition for Review & Adjudicatory Hearing
BRS Memorandum in Support of Motion to Dismiss

DEVELOPERS DODGE BULLET WITH NORTHERN LONG-EARED BAT

BY: CHANNING J. MARTIN

Developers have to deal with a number of environmental issues. These include stormwater management and potential impacts to wetlands, historic resources, and threatened and endangered species. The northern long-eared bat is the latest threatened species that developers must take into account before beginning construction.

In April 2015, the U.S. Fish and Wildlife Service (FWS) listed the northern long-eared bat as a threatened species under the Endangered Species Act (ESA). The bat exists in a large portion of the northeast, southeast and middle portion of the country, and it is affected by white nose syndrome (WNS). WNS is caused by a fungus in caves and abandoned mines where these bats hibernate. WNS causes them to wake early from hibernation at a time when they are no insects available on which the bats feed. Consequently, WNS has caused large populations of these bats to die.

Under the ESA, threatened species generally are afforded the same level of protection as endangered species,

unless FWS issues what is known as a §4(d) rule for that particular species. Once that's done, the Service can exempt the potential impact of certain defined activities on that species from ESA Section 9's "incidental take" prohibition. Whether FWS does this is completely discretionary; there are about 200 threatened species, but only about two dozen §4(d) rules.

Because the northern long eared bat roosts in trees, and developers have to clear trees before they can begin construction, the impact of this new listing on development over a large portion of the country would have been severe without a §4(d) rule. FWS issued an interim §4(d) rule that was effective on May 4, 2015. Without going into detail, suffice it to say that the interim rule imposed significant burdens, including limiting most tree clearing to one acre or less within a 150 mile buffer zone from the nearest documented case of WNS and imposing ¼ mile buffer zones during clearing around known roost trees. The alternative to complying with the rule was to conduct a bat survey or, alternatively, restrict clearing to the winter months (September-April) when the bats are not active.

The National Association of Homebuilders and others filed comments with FWS pointing out how the interim rule did not work. They noted that most clearing takes place in April through September -- precisely when the bats are active -- and that WNS is what is causing the decline, not loss of habitat by cutting trees.

FWS issued a final rule in January that becomes effective on February 16, 2016. It relaxes the restrictions on development. The final rule establishes a WNS Zone over all or portions of 32 states, and the restrictions apply only within this zone. (All of Virginia, most of North Carolina, and a portion of South Carolina are within the WNS Zone.) Tree removal is permitted within the WNS Zone *unless*: (i) the activity will occur within ¼ mile of a "known, occupied" hibernacula (a cave or abandoned mine), or (ii) *during the bat pup season (June-July)*, the activity cuts or destroys a "known, occupied maternity roost tree" or any tree within a 150 foot radius of it. Bat surveys are not required to determine the presence of hibernaculas and roost trees, but developers are required to use due diligence in making that determination. The rule is not explicit on what this must entail, but consulting databases maintained by state wildlife agencies may be sufficient.

How this rule will be addressed in permits issued by federal agencies, such as the Corps of Engineers, is not yet clear. Time of year restrictions will certainly be imposed, but the extent to which additional conditions will be added to permits remains to be seen. Also, developers are cautioned that even if their project is not within the WNS Zone now, that could change. WNS is spreading rapidly, and all it takes is one case to extend the WNS Zone to 150 miles around it. The WNS Zone map is updated monthly by FWS.

81 Fed. Reg. 1900 (Jan. 16, 2016)

EPA SIMPLIFIES SWPPPS FOR SMALL RESIDENTIAL CONSTRUCTION PROJECTS

BY: A. KEITH "KIP" MCALISTER, JR.

Developing a stormwater pollution prevention plan (SWPPP) for a construction project can take a lot of time and effort, and the requirements for a small project usually don't differ from those for a large project. EPA wants to change that. As of December, 2015, builders of small residential projects in the four states where EPA issues stormwater permits may use a new SWPPP template. The template significantly streamlines what has to be done to be able to use EPA's 2012 construction general permit (CGP). If your project is in one of the 46 states that issue their own permits, you're out of luck, at least for the time being. However, EPA's intention is that your state agency will see the value in the template and then incorporate it into the state's general permit program.

According to the National Association of Home Builders, EPA's new template is one-fifth the size of many SWPPPs and greatly simplifies the drafting process. For a project to qualify to use the template, all of the following criteria must be met:

- The project consists only of the construction of residential single family or duplex dwellings;
- The area of disturbance is less than one acre;
- Five or more single family dwellings or duplexes are not being built within the same common plan of development; and
- The builder is not responsible for construction and/or maintenance of roads (not including driveways) or storm sewer or ditch networks.

Other necessary requirements include that the project must be eligible for CGP coverage, it may not be located in a sensitive area, and it may not impact historic properties. Use of the template is optional, and CGP conditions such as submission of a Notice of Intent to obtain permit coverage and submission of a Notice of Termination to terminate permit coverage remain applicable.

To comply with the CGP, a builder may complete all sections of the template which then serves as a project's SWPPP. The document must be retained on-site and

available in accordance with permit requirements. If you'd like to use the template but can't because it's not applicable in your state, bring it to the attention of your state regulators and suggest that they consider adopting it into the state's construction stormwater permit program.

Small Residential Lot Stormwater Pollution Prevention Plan Template, 2012 EPA Construction General Permit, EPA 830-K-15-001 (December 2015).

CASE LAW UPDATES

BY: JESSICA J.O. KING

Clean Water Act

In last month's edition of Environmental Notes, we discussed the potential impact of two recent federal district court decisions finding that a citizen suit under the Clean Water Act (CWA) could be brought for discharges of pollutants to groundwater that ultimately reach surface water. The two cases we discussed were the Virginia case of *Sierra Club v. Va. Elec. & Power Co.* and the North Carolina case of *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC.* In *Yadkin Riverkeeper*, a North Carolina federal judge recently denied Duke Energy's motion to dismiss on the grounds the CWA does not govern the indirect discharge of coal ash pollutants to groundwater that is hydrologically connected to lakes, streams and tributaries. Immediately following the ruling, Duke asked the same judge to delay trial of the case to allow it to appeal the CWA jurisdiction issue to the U. S. Court of Appeals for the Fourth Circuit. In support, Duke pointed to the recent division among federal courts on the hydrological connection issue and the fact that the Fourth Circuit has yet to rule on this issue. On February 2, 2016, the judge rejected Duke's request, finding an "interlocutory appeal" was not warranted because there was no evidence of exceptional circumstances or that ultimate disposition of the case would be expedited by allowing the appeal. As we mentioned last month, the broadening of CWA jurisdiction to pollutants discharged to groundwater is a disturbing thought for businesses, and one with broad implications.

CERCLA

Last November, we reported on a decision by a Wisconsin federal district court under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA a/k/a Superfund). The issue there was whether NCR Corporation, one of the defendants, could avoid joint and several liability (liability for *all cleanup costs* despite the existence of other defendants) through proof of "divisibility." The burden was on NCR to prove the harm to the environment caused by multiple parties was capable of division and, if so, that there was a reasonable basis to apportion damages among the defendants. After reversing himself twice on motions for reconsideration, the district court judge held in early November that NCR had failed in its burden because its evidence on divisibility was unreliable. In late November, NCR, like Duke Energy in the *Yadkin Riverkeeper* case, asked the judge to certify the legal issue of divisibility to the U.S. Court of Appeals for the Seventh Circuit for an immediate appeal. On January 25, 2016, the judge denied the request, thus allowing the case to move forward to trial. He reasoned that the question of whether NCR met its burden of proof required an analysis of facts and was not the type of pure legal issue allowed to be appealed before a trial took place.

What's the take-away here? If legal arguments made at the outset of a case don't prevail, most of the time the defendant will have to go through the time, expense and risk of a trial before an appeals court will determine whether the ruling by the trial judge was correct. That makes these defendants more likely to settle than go to trial, something that both plaintiffs' lawyers and judges clearly understand.

Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, No. 14-cv-00753 (M.D.N.C. Feb. 2, 2016)
U.S. v. NCR Corp., No. 1:10-cv-00910 (E.D. Wis. Jan. 25, 2016)

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