



Virginia Federal Court Holds Groundwater Contamination Triggers Clean Water Act Jurisdiction

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Dominion Virginia Power (Dominion) operates a coal-fired power plant in Chesapeake, Virginia. It maintains permits for its operations, including a Virginia solid waste management permit and a Virginia Pollutant Discharge Elimination System (VPDES) permit. The solid waste permit allows Dominion to dispose of its coal ash in an on-site industrial landfill. Because coal ash contains arsenic and other heavy metals, Dominion is required by its solid waste permit to conduct monitoring to determine whether these constituents are impacting groundwater. The VPDES permit allows the company to discharge wastewater from the site into surface water, including the Southern Branch of the Elizabeth River. It does not authorize the discharge of coal ash contaminants.

On March 19, 2015, Sierra Club sued Dominion under the citizen suit provision of the Clean Water Act (CWA). The complaint alleged that the pollutants in the coal ash had contaminated groundwater, and that the groundwater under the plant was discharging to surface water. Sierra Club said a discharge of pollutants to surface waters via hydraulically-connected groundwater is subject to the CWA, and that Dominion was therefore violating both the Act and its VPDES Permit. Dominion moved to dismiss on several grounds, but its primary argument was that the CWA regulates discharges of pollutants from a point source to surface waters, not discharges of pollutants to groundwater.

Dominion's argument may sound like a slam dunk to many, but not to the federal district court judge who heard Dominion's motion. After examining other cases on the issue, he held Sierra Club's argument was sufficiently plausible to survive a motion to dismiss. This case follows in the footsteps of a similar case in North Carolina decided just two months earlier. There a federal judge also denied a power company's motion to dismiss a claim that its discharge of pollutants to surface water via groundwater was a violation of the CWA.

Now what? The defendant in the North Carolina case has already filed a motion asking the trial judge to allow an immediate appeal of this issue to the Fourth Circuit. We expect Dominion will do the same in

its case. If the judges do not allow an immediate appeal, then the cases will go to trial. Only after the trial would the cases then reach the Fourth Circuit.

However these cases turn out in the district courts, it's certain the Fourth Circuit will weigh in. The First, Fifth and Seventh Circuits have already ruled on this issue, and all of them refused to extend CWA jurisdiction to groundwater conduit cases. Our expectation is that the Fourth Circuit will do the same. In the meantime, it's a safe bet that environmental groups in Virginia, North Carolina, South Carolina and other states within the Fourth Circuit will be emboldened by these rulings and file more CWA citizen suits based on this legal theory. We'll keep you apprised of the outcome.

Sierra Club v. Va. Elec. & Power Co., No. 15-CV-00112 (E.D. Va. Nov. 6, 2015).

Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, No. 14-cv-00753 (M.D.N.C Oct. 10, 2015).

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