



Case Law Updates

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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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