Fourth Circuit Decision Conveys New Meaning of Clean Water Act "Point Source" for Coal Ash Ponds

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In the evolving *Sierra Club v. Virginia Electric & Power Company* case, the U.S. Circuit Court of Appeals for the Fourth Circuit has just reversed a Virginia-based federal district court on the key issue of whether a coal ash pond or landfill may serve as a point source of pollution to regulated waters. This case is yet another of several important recent federal court decisions addressing the scope of federal Clean Water Act ("CWA") jurisdiction. It further shapes in significant ways how discharge permitting and enforcement pursuant to the CWA's National Pollutant Discharge Elimination System ("NPDES") could be implemented in the Fourth Circuit's territory of Maryland, West Virginia, Virginia, North Carolina, and South Carolina.

As reported in the May 2018 edition of Environmental Notes, the *Sierra Club* case involves coal ash ponds and a coal ash landfill at a now-shuttered power plant in eastern Virginia. The Virginia Department of Environmental Quality ("DEQ") had issued a solid waste permit for the landfill and ponds that implemented coal ash management standards established pursuant to the federal Resource Conservation and Recovery Act ("RCRA"). DEQ had also issued the facility a Virginia Pollutant Discharge Elimination System ("VPDES") permit pursuant to Virginia's NPDES program approved by EPA. Monitoring required by the solid waste permit revealed arsenic leaching from the landfill and/or ponds into the groundwater. DEQ approved a corrective action plan and incorporated it into the solid waste permit.

Sierra Club nonetheless sued the power company pursuant to the CWA's citizen suit provisions claiming an unauthorized discharge of pollutants in violation of CWA § 1311(a). Due to observed exceedances of Virginia's groundwater quality standard for arsenic, Sierra Club also alleged violations of the VPDES permit's (i) Condition II.F prohibiting discharges of pollutants into state waters except as authorized by the VPDES permit, and (ii) Condition II.R prohibiting disposal of wastes and other pollutants in a manner that causes them to enter state waters. The district court agreed with Sierra Club's first count based on two key findings: (a) the landfill and ponds are "point sources" as defined in the CWA, and (b) a regulated discharge of a pollutant may occur even if the pollutants migrate through groundwater between the point source and the navigable waters where a direct hydrological connection exists

between the groundwater and the navigable water. However, the district court denied the alleged VPDES permit condition violations, instead deferring to DEQ's view that surface waters, not groundwater, are the types of "state waters" to be protected under these conditions. Each party appealed.

The Fourth Circuit's decision affirmed the district court regarding whether a regulated discharge from a point source must occur directly to surface waters rather than pass through groundwater first. The circuit court cited its own recent opinion in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), holding that a regulated discharge of pollutants may still occur where pollutants are discharged from a point source but pass through groundwater before entering regulated surface waters, so long as there is a "a direct hydrological connection" between the groundwater and the regulated surface waters. However, appeals from that decision and a similar decision from the Ninth Circuit Court of Appeals in *Hawai'i Wildlife Fund v. County of Maui* (see again the May 2018 edition of Environmental Notes) have now been filed with the U.S. Supreme Court.

Next, and most importantly, was the circuit court's review of the status of the landfill and settling ponds as "point sources." In short, the circuit court found they are not the sort of discrete conveyances contemplated by the CWA's definition of "point source," rejecting the district court's reasoning otherwise. The circuit court focused on the language of the definition of "point source" as a "discernable, confined, and discrete conveyance" including "but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." Based on the dictionary meaning of "conveyance," the circuit court further determined that a point source must facilitate movement of pollutants in "a discrete, not generalized," manner. Accordingly, passive seepage of rainwater and groundwater through a "static accumulation of coal ash," resulting in a diffused "leaching [of] arsenic into groundwater and ultimately into navigable waters," is not enough to qualify as a point source. Sierra Club's argument that the landfill and ponds were containers within the meaning of "point source" was also found inadequate. The court concluded that "the landfill and ponds were not created to convey anything and did not function in this manner." Further, the court opined that the CWA effluent limitation-based regime indicates that there should be measurable levels of pollutants discharging from point sources, but no such levels had been attributed to the landfill and ponds. Finally, the circuit court found that the district court's approach would render the more specifically-crafted RCRA coal ash permit program redundant, a result to be avoided if possible.

The Fourth Circuit then affirmed and expounded upon the district court's rejection of Sierra Club's allegations of violations of VPDES permit conditions. Relying in part on VPDES regulatory language for context, the Fourth Circuit noted that Condition II.F's prohibition against any "discharge into state waters" means that a point source is effecting such a discharge. Because that court determined that the landfill and ponds were not actually point sources, it likewise found that there was no violation of Condition II.F. For Condition II.R, the distinction between the broadly defined "state waters" (including groundwater and surface waters) versus "navigable waters" could not overcome the circuit court's concerns related to the regulatory context requiring a point source, deference to long-standing DEQ interpretation that these Conditions pertain only to surface waters, and the fact that Sierra Club's interpretation of Condition II.R would render the rest of the VPDES permit's terms meaningless.

The *Sierra Club* case sets another marker for the reach of CWA jurisdiction and has implications for a variety of land-based waste units. This case, together with other recent cases, sets the stage for appeals to the U.S. Supreme Court on several CWA issues, which means these issues – and the regulatory uncertainty surrounding them – will remain active for some time.

Sierra Club v. Virginia Electric & Power Company, No. 17-1895 (4th Cir. September 12, 2018).

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