

# EPA Administrative Law Reporter

A MONTHLY JOURNAL OF ENVIRONMENTAL APPEALS BOARD, ALJ, FEDERAL AND STATE DECISIONS

RCRA Editor  
Michael W. Steinberg, Esq.

Publisher  
Neil J. Cohen, Esq.

Water Editor  
Colburn T. Cherney, Esq.

Volume 43, Number 3

Washington, D.C.

March 2014

## HIGHLIGHTS

The most noteworthy decisions this month are the following:

- In *In re Deepwater Horizon*, No. 12-30012 (5th Cir. Feb. 24, 2014), claims under Louisiana's Wildlife Protection Statute asserted by 11 Louisiana parishes for an offshore drilling rig's disastrous oil spill on the Outer Continental Shelf were properly removed to federal court, which properly dismissed the claims. Affirming the district court, the Fifth Circuit held the claims were preempted by the CWA as interpreted by the Supreme Court in its 1987 decision in *Ouellette*.
- In *Kentuckians for the Commonwealth v. United States Army Corps of Engineers*, No. 13-6153 (6th Cir. Mar. 7, 2014), Judge Rogers, writing for the Sixth Circuit Court of Appeals, affirmed the trial court's holding that an environmental assessment under NEPA may be limited in scope to the impacts of the specific activity authorized under a proposed § 404 permit. In affirming the district court's dismissal of plaintiffs' claims asserting violations of NEPA and the Clean Water Act (CWA), the court found that the Corps of Engineers complied with appropriate regulations and did not act arbitrarily or capriciously in finding no significant impact.
- In *Native Village of Point Hope v. Jewell*, No. 12-35287 (9th Cir. Jan. 22, 2014), the Ninth Circuit Court of Appeals reversed the district court's summary judgment in favor of the Bureau of Ocean Energy Management and remanded, for further consideration, plaintiffs' challenge of the Bureau's Environmental Impact Statement (BOEM) addressing the lease of oil drilling rights off the coast of Alaska. The court held that the Final EIS (FEIS) and Supplemental EIS properly accounted for unavailable or missing information, but found that the Bureau acted arbitrarily and capriciously in using a one billion barrel estimate of total economically recoverable oil.

*(continued on page 4)*

## Contents

Page

### ENVIRONMENT 2014:

WATER ISSUES .....5

RECENT DECISION INDEX .....11

DECISION SUMMARIES .....14

### DOCUMENTS

#### FEDERAL COURT OPINIONS

*Opinion, In re Deepwater Horizon*

*Opinion, Kentuckians for the Commonwealth v. United States Army Corps of Engineers*

*Opinion, Native Village of Point Hope v. Jewell*

*Opinion, LWD PRP Group v. ACF Industries, LLC*

*Opinion, Stillwater of Crown Point Homeowner's Association, Inc. v. Stiglich*

*Opinion, Pennsylvania Department of Environmental Protection v. Allegheny Energy, Inc.*

# Environment 2014: Water Issues

by

Benne C. Hutson, John M. Lain, Bernadette M. Rappold,  
James A. Thornhill, Heather Nixon Stevenson & Dale G. Mullen

*McGuireWoods LLP*

As the year begins to unfold, a number of longstanding water issues, such as numeric nutrient standards, rules regarding the Clean Water Act's jurisdiction and cooling water intakes, and effluent limitation guidelines for coal-fired power plants, remain in the forefront, along with heightened interest in drought management and releases from aboveground storage tanks and coal ash ponds. Each of these is likely to have significant effects throughout the regulated community.

The key water issues to follow throughout the remainder of 2014 include the following:

## **EPA's Nutrient Management Strategy—More than Just Numeric Limits**

With the Florida nutrient battle apparently over, EPA has turned its attention to the Mississippi River and Gulf of Mexico watershed. As opposed to the “nothing but numeric limits” approach it took in Florida, EPA and other federal agencies have been working together through a task force to coordinate nutrient management actions and programs in the Mississippi and Gulf of Mexico watershed, where each summer nutrient runoff is a major cause in the creation of a 5,700-square-mile hypoxic dead zone (about the size of Connecticut). To date, five states have finalized or prepared draft nutrient reduction strategies, with seven more states expected to complete them this year.

In its comments on certain state nutrient reduction strategies, such as Iowa's, EPA has recommended best management plan optimization at the watershed and farm scale to craft effective nutrient regulation schemes. In addition, the federal government has provided \$341 million for projects in 640 watersheds, for conservation practices to implement nutrient management programs, conservation crop rotation, cover crops, and other residue and tillage management.

While EPA's primary focus may have turned away from numeric nutrient limits, environmental groups are still pushing for such standards. Late last year, environmental groups successfully obtained a ruling requiring EPA to make a determination as to whether numeric nutrient limits are required for the lower Mississippi Basin. EPA's appeal of that ruling is pending.

EPA itself has not totally abandoned the use of numeric limits. The agency continues to defend an NPDES permit it issued to several New Hampshire communities incorporating nitrogen discharge limits based on suggested, not final, criteria developed by the state's environmental agency. EPA also recently released guidance that will allow states to establish combined nutrient criteria where biological indicators support such criteria. In using this approach, states are not required to set separate numeric criteria for each nutrient but instead may develop combined criteria based on how aquatic organisms respond to levels of pollutants. Overall, EPA appears to be looking for a way to provide support for both regulatory and market-based approaches to manage nutrients, with lessons learned in trying to clean up the Chesapeake Bay being likely guides for such efforts.

#### **Clean Water Act Jurisdictional Rule**

In September 2013, the Corps of Engineers and the EPA submitted a draft jurisdictional rule to the Office of Management and Budget. The rule would modify the Corps regulations to include "all natural and artificial tributary streams, lakes, ponds and wetlands . . . that affect the chemical, physical and biological integrity of larger downstream waters." The rule also would be expanded to include wetlands and streams that neighbor jurisdictional wetlands or waters. The proposed rule, which has not been formally posted, has caused alarm among the regulated community because of a concern that the new rule will drastically expand the Corps' jurisdiction from its current state following the *Rapanos* and *SWANCC* decisions of the Supreme Court that had limited Corps authority.

The rule is anticipated to be released during the first quarter of this year, pending completion of the review of EPA's wetlands connectivity study that is designed to form the scientific basis for determining how seemingly unconnected wetlands and streams can be connected to the larger navigable waters. Once released, the regulated community will be able to comment on the rule before it is finalized.

#### **Cooling Water Intake Rule**

The long-running drama of EPA's completion of its cooling water intake rule for existing facilities will continue this year. The EPA missed its deadline from last November to issue the Phase II cooling water intake rule, stating that the government shutdown in October prevented it from being released. EPA negotiated an extension with the environmental groups until Jan. 14 to complete the rule, but it then missed that deadline. On Feb. 10 of this year, EPA and the environmental groups agreed upon a new deadline of April 17, 2014.

The rule, which is required under Section 316(B) of the Clean Water Act, is focused on reducing fish mortality from impingement and entrainment at water intake structures. Environmental groups have pressed for mandatory closed cycle cooling, but EPA's earlier

release of the rule allowed for more site-specific flexibility to meet the impingent and entrainment reduction goals. As the rule will affect approximately 1,200 electric utilities and large manufacturing sites, the potential costs of compliance are very high. It is hard to determine those costs until a final rule is released, which, based on past history, is a moving target despite the many different deadlines that have been set. Still, even if EPA misses the April 17 deadline, it is reasonable to expect that the final rule will be issued this year.

#### **Coal-Fired Power Plant—Effluent Limitation Guidelines**

EPA is required to issue final effluent guidelines for toxic pollutants by May 22, 2014, pursuant to court-approved settlement in litigation with the Defenders of Wildlife. The EPA released a proposed rule in the spring of 2013 that contained four regulatory options for the number of waste streams covered, the size of covered units and the stringency of the controls. Estimated costs of the options range from \$185 million to about \$1 billion per year depending upon the option selected. EPA has also said that it wishes to coordinate the issuance of this rule with its rule on coal combustion residuals that is to be finalized by December of this year.

#### **Of Coal Ash Ponds and Aboveground Storage Tanks**

The recent releases of chemicals and coal ash from Freedom Chemical in West Virginia and Duke Energy's Dan River plant in North Carolina will make the potential for future releases from both coal ash ponds and aboveground storage tanks the subject of regulatory, legislative and judicial actions at both the state and federal levels throughout 2014. Citizen suits will be a likely weapon with coal ash ponds as environmental groups seek to force closure of such units, with the debate centering on both how the ponds should be closed (either in place through removal of liquids followed by capping or by digging up the ash and putting it in a new, lined unit) and inspection for ongoing leaks followed by assessments and clean-ups. Legislation will likely set aggressive time lines for the closure of coal ash ponds while setting the stage for the first-ever comprehensive regulation of aboveground storage tanks.

#### **Drought Management**

The eyes of the country will be on both California and Texas as these two large states deal with unprecedented drought conditions. Early in the new year, California Governor Jerry Brown declared a state of emergency, requiring, among other things, that municipalities and state agencies implement water shortage contingency and water use reduction plans and that the state's water board put all water right holders on notice that they may be directed to cease or reduce water diversions. Governor Brown also suspended state water quality laws for actions agencies take to address the drought, a move that concerns many

environmentalists. Texas continues to develop flow standards for each of its rivers through a stakeholder process. However, those efforts may in some instances be stymied by federal laws such as the Endangered Species Act. Last year, a federal judge found the state liable for the death of 23 whooping cranes because it failed to ensure that sufficient water was released down the two rivers where the birds like to spend their winters. In addition to in-state efforts, Texas has also set its sights on its neighbors New Mexico and Oklahoma, spending millions on litigation to gain access to what it describes as surplus water in those states. How California and Texas deal with these issues will likely set a model for other states, if and when drought conditions arise elsewhere.

#### **Agricultural Stormwater Discharges**

The animal agriculture industry is closely watching EPA's appeal of a recent federal district court decision defining the scope of the Clean Water Act's exemption for "agricultural stormwater discharges."

In *Alt v. EPA*, the Northern District of West Virginia last year eroded EPA's ability to regulate concentrated animal feeding operations (CAFOs), holding that stormwater that comes in contact with poultry dander and manure incidentally blown from chicken barns constitutes "agricultural stormwater discharges" exempt from regulation under the Clean Water Act. The decision stemmed from EPA's 2011 issuance of an administrative compliance order to Lois Alt, who operated a chicken CAFO in Hardy County, West Virginia. In its order, EPA found Alt's operations violated the Clean Water Act when stormwater carried dust, manure, feathers and dander blown from barn ventilation fans to waters of the United States. From this, EPA opined that Alt was required to apply for a National Pollutant Discharge Elimination System (NPDES) permit and face fines of \$37,500 for each violation. Alt disagreed and filed a declaratory judgment action in district court.

Though EPA withdrew its administrative order and sought to have Alt's case dismissed as moot, Judge John Preston Bailey disagreed and on Oct. 23, 2013, sided with Alt, rejecting EPA's efforts to define the area adjacent to Alt's chicken barns as a "production area" ineligible for the agricultural stormwater exemption. EPA and several environmental groups have appealed Judge Bailey's decision to the 4th U.S. Circuit Court of Appeals in Richmond, Virginia, on both procedural and substantive grounds.

#### **EPA's New Tool for Sidestepping Consent Orders**

Besides setting a standard for how to set numeric nutrient limits in the most costly and litigious way possible, the effort in Florida has also given EPA a legal precedent for modifying consent decrees.

EPA and the Florida Department of Environmental Protection worked for several years to develop and adopt numeric nutrient limits for all of Florida's waters as a result of a consent order between EPA and a number of environmental groups in 2009 and a 2009 EPA determination that numeric criteria were required. By June 2013, EPA had not only approved the water quality standards but had also amended its prior 2009 determination such that numeric nutrient criteria were no longer required for certain limited water bodies that the agency believed could be adequately protected with narrative criteria.

Based on this, EPA filed a motion to modify the 2009 consent decree to reflect the agency's recent decision relating to numeric criteria. The environmental organizations involved objected, claiming that EPA was required to comply with the original 2009 consent order. The court found that there had been a change of circumstances and therefore upheld EPA's request to modify the consent order.

While this decision seems to be a relatively benign finding, the impact on parties trying to enforce a consent order on EPA is substantial. In any case where EPA can show changed circumstances, there is now precedent that allows a court to back the agency's new position and prevent enforcement of, or allow for the establishment of more stringent, consent order provisions.

#### **Possible Holes in the Permit Shield**

Section 402(k) of the Clean Water Act establishes what is known as the "permit shield," providing that compliance with an NPDES permit will be deemed compliance with the other provisions of the act, including the prohibition against unpermitted discharges. Two cases on appeal from U.S. district courts have a potential to shape the way mining and other industrial operations are protected by the permit shield.

In *Southern Appalachian Mountain Stewards*, the Western District of Virginia held that a permittee must fully disclose information about its discharge of a pollutant to the permitting agency in order for the permit shield to be available. The court held that because A&G Coal had not identified selenium discharges on its NPDES applications, the Virginia Department of Mining, Minerals, and Energy could not have "reasonably contemplated" it in generating the NPDES permit and thus the shield could not be claimed.

In *Sierra Club v. ICG Hazard*, the 6th Circuit Court of Appeals is considering a case on appeal from the Eastern District of Kentucky, which held that the permit shield provided protection to ICG Hazard from liability despite sampling data indicating selenium levels in excess of state water quality standards.

### **Possible MCL Change for PCE and TCE**

EPA completed its last six-year review of the National Primary Drinking Water Regulation in 2010 and identified four contaminants for consideration for lowering of the Maximum Contaminant Level (MCL), including: tetrachloroethylene (PCE) and trichloroethylene (TCE). The current MCL for each is 5 ug/L. PCE, a common degreaser used in the dry cleaning for decades, and TCE, a daughter product of PCE and a commonly used industrial degreaser, have impacted groundwater across the country, including drinking water supplies. In 2011 and 2012 EPA issued new toxicity information on TCE and PCE, respectively, and subsequently lowered its Regional Screening Levels for tap water to 0.44 ug/L for TCE and 2.0 ug/L for PCE. We may see similar proposed new MCLs in 2014, with final levels set in the next few years. Removal of PCE and TCE to such low levels could significantly increase the treatment of drinking water with such contaminants.