K&L GATES CAROLINAS ENVIRONMENTAL UPDATE

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Environment Land and Natural Resources Update

By: Stanford D. Baird

WELCOME TO THE K&L GATES CAROLINAS ENVIRONMENTAL UPDATE

With experienced environmental attorneys in four offices across North Carolina and South Carolina, K&L Gates solves environmental problems for clients across business sectors. While many environmental laws originate in Washington, D.C., state and local agencies routinely implement and enforce environmental rules and regulations. In this space, we will profile environmental issues and topics that impact the regulated community in the Carolinas. The goal is simply to raise awareness of environmental issues important to business and invite further inquiry. We invite you to contact us if you would like to know more about any of the topics covered in this edition or in future updates.

EVOLVING REGULATION OF EMERGING CONTAMINANTS: A CAROLINAS PFAS UPDATE

By: James L. Joyce

Regulators at the national and state level continue to move toward stricter regulation of per- and poly-fluoroalkyl substances ("PFAS"). Below are a few of the key initiatives at the federal level and at the state level in the Carolinas.

Federal Actions

On April 25, 2019, the U.S. Environmental Protection Agency ("EPA") published for public comment its Draft Interim Recommendations to Address Groundwater Contaminated with Perfluorooctanoic Acid and Perfluorooctane Sulfonate. This was a step in implementing the EPA's PFAS Action Plan that was issued on February 14, 2019, and is described in more detail in a February 2019 K&L Gates client alert. The Draft Interim Recommendations address screening levels and a preliminary remediation goal ("PRG") for two of the most common PFAS chemicals, PFOA and PFOS, in the context of federal cleanup programs. The EPA recommends a screening level of 40 parts per trillion ("ppt") and a PRG of 70 ppt for PFOA and PFOS in groundwater that is a current or potential source of drinking water. Additionally, the EPA recommends using 70 ppt for the combined concentration of PFOA and PFOS as the PRG. The EPA recommendations are open for public comment until June 10, 2019.

The EPA's PFAS Action Plan includes several key items:

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- A "regulatory determination" for two of the most common PFAS chemicals, PFOA and PFOS, by the end of 2019, which will at some point in the ensuing year or two result in a maximum contaminant level ("MCL") for purposes of regulating levels of PFAS in drinking water under the Safe Drinking Water Act;
- Listing PFOA and PFOS as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which would result in PFAS-contaminated properties needing to be remediated for those compounds in addition to any other required remediation;
- Adding PFAS chemicals to the Toxic Release Inventory, which would require certain producers of PFAS to disclose their emissions and releases;
- Developing further analytical methods and toxicity assessments to improve detection, treatment, and remediation of PFAS;
- Using enforcement to address PFAS exposures; and
- Developing a "risk communication toolbox" to build trust with the public and communicate risks where scientific conclusions regarding health risks is lacking.

Many legislators have expressed disappointment with the EPA's pacing, and a handful of bills have been introduced to nudge the process, but none of these bills has yet made it out of committee.

In the meantime, many states have decided not to rely on the federal government and have taken action on their own initiative. For example, New Jersey set drinking water concentration limits of 13 ppt for PFNA and 14 ppt for PFOA; Vermont issued emergency PFAS drinking water limits of 20 ppt for PFOA, PFOS, PFHxS, PFHpA, and PFNA; and California proposed preliminary notification levels at 14 ppt for PFOA and 13 ppt for PFOS.

North Carolina Actions

In North Carolina, much of the action lately has been focused on scientific study. The North Carolina Policy Collaboratory, an organization established by the North Carolina General Assembly to leverage practical solutions from the University of North Carolina system, is in the process of conducting a program of statewide water sampling to determine baseline levels of PFAS compounds across the state. Much of the preliminary work of selecting sites and methodologies is complete, and sampling is beginning.

In the meantime, several bills have been introduced in the North Carolina General Assembly, but none appear to be gaining traction. Both a ban on PFAS-containing foam and a measure to expand the scope of water discharge regulation to capture more currently unregulated contaminants have been assigned to a committee gauntlet that typically represents a death sentence for any North Carolina bill. Some insiders suspect that a bipartisan bill based on the American Chemistry Council's model legislation may be introduced, but such a bill does not appear to have been introduced to date.

South Carolina Actions

The South Carolina General Assembly and South Carolina Department of Health and Environmental Control remain largely silent on PFAS regulation. On the other hand, the U.S. District Court for the District of South Carolina will be the situs of multi-district litigation over aqueous film forming foam ("AFFF").

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PROPOSED REVISIONS TO DEFINITION OF WOTUS MOVE TOWARD A FINAL RULE

By: Christopher A. Jaros

On February 14, 2019, the US Army Corps of Engineers and US EPA (Agencies) published a proposed rule to revise the definition of "waters of the United States" under the Clean Water Act (CWA), 84 Fed. Reg. 4154 (Feb. 14, 2019). Because the CWA prohibits the unpermitted discharge of "pollutants" (which includes soil or fill material) into "waters of the United States" (WOTUS), the definition of WOTUS determines the scope of the Agencies' jurisdiction with respect to a large number of activities that many people would typically consider outside of EPA's jurisdiction. For example, where a person intends to use fill material in construction or development activities, whether that activity falls under the Agencies' jurisdiction (and thus requires a permit) is based upon whether any of the fill material is placed in WOTUS. In that regard, as the definition of WOTUS expands to include waterways beyond those that are navigable, so does the Agencies' jurisdiction with respect to construction and development activities.

Under the Obama-era WOTUS rule finalized in 2015, WOTUS is defined to include those waters that are "adjacent" to a tributary or navigable water. Whether those waters are considered adjacent is based upon a fact-specific evaluation of whether the waters have a "significant nexus" to a tributary or navigable water, which includes consideration of the distance of the waters to a 100-year floodplain of a tributary or navigable water, as well as other factors. In addition, the 2015 WOTUS rule included waterways with only ephemeral connections to tributaries and navigable waters (such as those present during rain and snow), which may only arise seasonally. In contrast, the new proposal will define WOTUS to include only those waterways that abut or have a direct hydrologic surface connection to another WOTUS. In addition, the proposed definition would eliminate from federal jurisdiction waterways with ephemeral connections, and instead only include direct surface connections.

The Agencies assert that the new test will result in greater predictability and uniformity in application of the CWA across the country. In addition, the Agencies assert that the rule is an attempt to "preserve the traditional sovereignty of States over their own land and water resources." As proposed, the new definition is expected to decrease the number of waterways subject to federal jurisdiction under the CWA. The public comment period on the proposed rule closed on April 15, 2018. Given the history of the rule, the enormous resources that have been expended by both proponents and critics of the proposed rule, and its potential impact on construction and development activities, litigation is nearly certain once the Agencies publish a final rule.

BIG CHANGES AHEAD FOR THE NEUSE AND TAR-PAMLICO RIVER BASINS

By: Stanford D. Baird

The Tar-Pamlico and Neuse River Basins touch parts of no fewer than 22 counties in North Carolina and include many communities that have seen significant development and growth over the past 20 years. Nutrient-related pollution has been a documented problem for surface waters in both river basins since the 1980s. Nutrients, such as nitrogen and phosphorous, have caused on-going water quality issues, and years ago, were responsible for low levels of oxygen leading to fish kill events and algae blooms. In response, North Carolina designated these basins as "nutrient sensitive" and developed special regulations to address nutrient loading to surface waters in the Tar-Pamlico and Neuse River Basins. These included rules designed to limit and reduce nutrient loading from wastewater, stormwater, and agricultural operations. Rules for the Neuse River Basin were intended to reduce

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nitrogen loading by 30% from a baseline figure. Likewise, rules for the Tar-Pamlico Basin sought to reduce total nitrogen loading by 30% and keep phosphorous levels static at a 1991 baseline. The rules have now been in place for over 20 years and include provisions related to stormwater management at new developments, riparian buffers, point source limitations, and nutrient load allocations and trading.

The North Carolina Department of Environmental Quality (DEQ) has proposed significant changes to the nutrient management rules for both river basins in a stated effort to further reduce nutrient loading and stress on the waters in these nutrient sensitive basins. The proposed rules have been in the works for a number of years, but were formally proposed by publication in the North Carolina Register on February 15, 2019, with a proposed effective date of November 1 this year. The proposed rules first would change the landscape of stormwater management in the basins. In the Neuse basin, the proposed rule requires an additional sixteen (16) local governments to implement stormwater requirements in their jurisdictions, and DEQ will develop a model ordinance to be adopted by these jurisdictions. All local governments subject to the rule will then be required to adopt a conforming stormwater program. In the Tar-Pamlico basin, the proposed rule adds Granville, Vance, and Wilson counties as local governments that will be required to adopt the state-mandated stormwater program for new development. Stormwater programs in both basins will require plan approval for single family residential, duplex, and recreational projects disturbing one acre or more and will require plan approval for multifamily, industrial, and commercial projects that disturb one-half acre or more. Additionally, the technical calculation of nutrient runoff and reductions provided by stormwater control measures will require the use of the DEQ Stormwater Nitrogen, and Phosphorous Tool (SNAP Tool). DEQ estimates that the cost of new development generally will increase as a result of the stormwater rule proposal.

The proposed rules also overhaul the nutrient offset and credit trading program. A full discussion is beyond the scope of this newsletter, but there are important changes in the proposed rule that will impact parties who may depend on the availability of nutrient offsets for development or for new or expanding wastewater systems. In short, the proposed rule extends the nutrient offset credit system to the Tar-Pamlico basin (with the exception of members of the Tar-Pamlico Basin Association) and reworks the offset credit process. The proposed rule introduces the concept of permanent versus temporary credits (called "term credits"), clarifies the geographic restrictions for credit generation and use, and sets a nonpoint source to point source trading ratio of 1.1 to 1 instead of the current 2 to 1 and 2.1 to 1 ratios currently in place for the Neuse and Tar-Pamlico basins respectively. Additionally, the proposed rule would no longer permit the practice of "credit stacking," where nutrient offset credits and stream mitigation credits may be generated and banked based on the same project and then essentially sold twice.

New and expanding wastewater treatment systems would also face a new reality related to nutrient management under the proposed rules. Instead of making offset payments fixed by a formula or a rate set periodically by DEQ, new and expanding dischargers generally would have to purchase or lease existing nutrient allocations held by current dischargers or purchase new or banked offset credits that can be extremely expensive. This portion of the proposed rule is based on the speculation that there is a pool of available existing nutrient allocations available for purchase or lease. However, the availability of existing nutrient allocation for sale or lease from current dischargers is doubtful.

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DEQ held public hearings on the proposed rules on March 26 and March 28, 2019, and the public comment period ended on April 16. DEQ anticipates final adoption by the Environmental Management Commission later this year. For more information, click here.

GETTING TO KNOW... CHRIS WALKER

By: Laura B. Truesdale

Chris Walker is a Partner in the Charlotte office of K&L Gates LLP. Chris currently focuses his practice on environmental and regulatory matters, including environmental remediation, enforcement defense, chemical regulation, solid and hazardous waste, environmental permitting, environmental insurance, aboveground and underground storage tanks, and brownfields redevelopment. Chris joined the firm in 2008 and has been practicing in the Environment, Land and Natural Resources practice group. Originally from Charlotte, Chris grew up thinking he would study economics (like his dad who was a banker and his brother who went to business school). However, after graduating from Sewanee (a/k/a The University of the South) in 2003, Chris' life took a different turn.

How did you get started in environmental law? Earlier on, being a lawyer never crossed my mind. After college graduation, I moved out to Telluride, Colorado to be a fly fishing guide. I was a natural resources major in college (studying forestry and geology) and a couple of my fishing clients ran oil and gas companies in Texas. I talked to them about going into petroleum geology, and, after shadowing one of them, I realized that was not for me. I knew I wanted (or actually just realized I probably had to) do something with my life other than guide fishing and be a ski bum. I had a friend who was attending Vermont Law School and piqued my interest in Vermont. I started looking at law schools and ended up taking a bit of a risk by trying law school and ended up loving it.

Becoming an environmental lawyer was being in the right place at the right time. While I studied environmental law at Vermont Law School, when I started at Kennedy Covington Lobdell & Hickman (which later merged with K&L Gates), I split my time between the real estate and environmental practice groups. My first year of practice happened to coincide with the recession. In a way, the recession was one of the best things that could have happened to me. There was very little real estate work at that time, and I ended up filling my plate with environmental work. As soon as I started getting into environmental work, I knew it was what I wanted to do and never looked back.

Who are your typical clients? Most of my clients are real estate developers and investors. Generally, my practice involves helping clients buy, sell, clean up, redevelop and finance contaminated or potentially contaminated properties. I also do a lot of work for large international industrial clients and help them with their Superfund site work and regulatory matters.

What is the most challenging project you've worked on? I recently worked on a tough project dealing with PCBs contained in building materials such as caulk and paint. The laws regulating PCBs are not well designed for addressing PCBs in building materials, and I was constantly working with my client and the regulators to figure out how to fit a square peg in a round hole.

What is the most rewarding part of your job? I spend over half of my time working on brownfields redevelopment projects. I like the tangible part of seeing a site go from start to finish. It is exciting to have a client call me about an old, abandoned industrial site that they want to redevelop and then getting to see the property

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from the first site visit all the way to the ribbon cutting. It is also exciting to see how the work we are doing can help change a city. The North Carolina Brownfields Program is a big part of how Charlotte (and the state) is changing, and I love that I get to play a role in that.

If you weren't an environmental lawyer, what would your dream career be? I would definitely be a fly fishing guide or own a fly shop.

What is the best piece of career advice you have ever received? Make sure you enjoy being around the people you work with. It's important to be surrounded by good people because you're going to be spending a lot of time with them.

What are your interests outside of the office? Fly fishing, fly tying, skiing, and spending time with my wife and kids.

What is something your clients would be surprised to learn about you? I used to have long hair and a long beard, and I slept on a couch with my dog (for only $50/month rent) for a few years when I lived in Colorado. I also used to have my pilot's license.

What's keeping you busy right now? PFAS / emerging contaminants (going to be part of our lives for years), brownfields redevelopment, and water quality issues.

EPA FINALIZES MANAGEMENT STANDARDS FOR HAZARDOUS WASTE PHARMACEUTICALS RULE

By: Christopher S. Walker, Lori P. Hinnant, and Laura B. Truesdale

A new hazardous waste rule, effective August 21, 2019, now specifically addresses pharmaceuticals including nicotine replacement products, in a separate category. The rule will affect businesses and "healthcare facilities," a term that is broadly defined to include a variety of facilities such as hospitals, doctors' offices, pharmacies, and nursing care facilities. Among other changes, the rule bans flushing hazardous waste pharmaceuticals down the drain. Since this has been a routine and longstanding means of disposal for healthcare facilities, this change will be significant to implement.

Additionally, the rule addresses "reverse distribution," (also referred to as "reverse logistics" for the management of nonprescription pharmaceuticals and other unsold items) which concerns the management of unused prescription pharmaceuticals and the process of helping healthcare facilities calculate and receive credit from pharmaceutical manufacturers for returning those pharmaceuticals. One of the more significant clarifications made regarding reverse distribution involves the determination of the point of generation of hazardous waste, which defines when the hazardous waste regulations start to apply and who must comply with them. The rule clarifies that the decision to discard prescription pharmaceuticals is made at the healthcare facility (i.e., the healthcare facility is the point of generation) but that, as long as there is a reasonable expectation of legitimate use/reuse, nonprescription pharmaceuticals sent through reverse logistics are not considered hazardous waste at the healthcare facility level. The rule further clarifies that unsold retail items sent through reverse logistics are not considered wastes at the healthcare facility or retail store level. Therefore, the primary hazardous waste management burdens fall on the parties carrying out reverse logistics for nonprescription pharmaceuticals and unsold retail items.

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Finally, the rule changes the hazardous waste status for smoking cessation products. Previously, because nicotine was designated as a P-listed commercial chemical product (P075), smoking cessation products containing nicotine as their sole active ingredient had to be managed as hazardous waste upon disposal. Under the new rule, however, generators of over-the-counter smoking cessation products may discard most of these products as solid wastes instead of hazardous wastes. The rule's relaxation of the regulations for smoking cessation products is significant especially in the tobacco-producing states in the Southeast. The rule does not, however, provide the same relief for e-cigarettes, e-liquids, and prescription nicotine replacement products, which are managed under the rule as hazardous waste pharmaceuticals.

Though states that administer their own hazardous waste program (including several southeastern states) must follow federal rules, they can choose to adopt rules that are stricter. We continue to monitor state-specific adoptions of the rule. For more information, our detailed analysis of the rule and potential implications related to it can be found here.

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