ANNUAL REPORT OF THE SOUTH CAROLINA BAR ENVIRONMENT AND NATURAL RESOURCES SECTION

The following selection of cases and legislative enactments may be of interest to the environmental practitioner and were selected from the 2015 calendar year.[1]

CASE LAW UPDATE

SOUTH CAROLINA STATE CASES:

Town of Arcadia Lakes et al. v. S.C. Dep't of Envtl. Control et al., 404 S.C. 515745 S.E.2d 385 (Ct. App. 2013).

After DHEC granted coverage under the State General Permit for Storm Water Discharges from Large and Small Construction Activities to a new subdivision, nearby property owners and a nearby municipality, Arcadia Lakes, appealed. Arcadia Lakes argued the permit would cause harm to the nearby Cary Lake, which was within Arcadia Lakes but the town had no responsibility for the lake as it was private.

The Administrative Law Judge, Judge McLeod, denied Arcadia Lake's motion for reconsideration and for stay of it Final Order and Decision issued on January 21, 2010, finding that Arcadia Lakes and the other petitioners lacked standing. The ALC's decision was based on its finding that the petitioners lacked a personal stake in the litigation. The ALC specifically found that any injury, if it occurred, would be caused by a permit violation, not by the issuance of the permit itself. Thus, the ALC distinguished the issue of alleged "harms" occurring as a result of a permit violation from allegations of harm from the issuance of the permit itself, the former not composing a basis for standing.

On appeal, the Court of Appeals affirmed the ALC's holding that the petitioners did not have standing because they did not have a property interest affected by the development. The case was appealed to the South Carolina Supreme Court, with Certiorari granted and oral arguments held in March 2015. Following argument, the Supreme Court dismissed the appeal as moot, as the permitted project had been completed (Order dated April 9, 2015).

Maull v. SCDHEC, et al., 411 S.C. 349768 S.E.2d 402 (Ct. App. 2015).

The Court of Appeals affirmed the ALC's decision and DHEC's permit to issue an amendment to a critical area permit for a dock along the Intercoastal Waterway. Specifically, the Court of Appeals affirmed the ALC's holding that the matter involved interests between two neighboring dock owners and was a private dispute that did not affect the public interest, relying on Dorman v. South Carolina Department of Health and Environmental Control, 350 S.C. 159, 565 S.E.2d 119 (Ct.App.2002). The Court did remand a portion of the case, finding that the ALC did not address issue of the extent to

[1] Compiled by the Secretary of the Environmental and Natural Resources Section of the SC Bar, Chad N. Johnston, Esquire, of Willoughby & Hoefer, P.A., in Columbia, South Carolina.

which the proposed use could affect the value and enjoyment of adjacent owners as required by statute.

Orr v. SCDHEC and Sumerel Poultry Farm, Docket No. 13-ALJ-07-0395-CC (McLeod, J.) (Jan. 12, 2015).

This case involves a contested case from the issuance of an agricultural permit for a farm. It is indicative of the growing complexity of agricultural farm permitting appeals involving multiple expert witnesses on both sides, air issues, review of potential water impacts, health impacts. The contested case hearing took two days and the Order comprised 36 pages. DHEC's permit was upheld. This case was appealed to the Court of Appeals and is currently awaiting assignment to the roster.

Abel v. SCDHEC, Docket No. 14-ALJ-07-0282-CC (Robinson, J.) (Feb. 12, 2015).

Pawley's Island Community Church obtained a stormwater permit and Section 404 permit in 2000 to add a new sanctuary and make other improvements. The Abels filed a request for contested case hearing for the stormwater permit and the parties resolved the dispute in a consent order in 2001. The consent order called for half of the wetlands on the site to be preserved; the church agreed that the wetlands preserved by the consent order "shall remain in its natural state," and the church agreed to maintain a vegetated buffer. In 2012, the church obtained new stormwater and Section 404 permits for a new construction project. The Abels requested a contested case hearing, seeking to enforce the 2001 consent order. The ALC ruled that the 2001 consent order was an enforceable contract, but its applicability was limited to the 2001 construction project. This case was appealed to the Court of Appeals and is currently awaiting assignment to the roster.

Dreher v. South Carolina Department of Health and Environmental Control, 412 S.C. 244, 772 S.E.2d 505 (2015).

The South Carolina Supreme Court found that the ALC and DHEC erred in denying a permit to construct a bridge to a small tract of land located on Folly Island, but surrounded by coastal tidelands and waters following the construction of two man-made canals. DHEC denied the permit, finding that the tract was a "coastal island" of less than two acres and therefore agency was prohibited from issuing the permit under the applicable OCRM regulations. The Supreme Court reversed the denial of the permit, finding that the exemption for Folly Beach within the specific exemption for Folly Island in the regulations controls over the more general regulatory definition of "coastal island."

Grand Bees Development, LLC v. South Carolina Department of Health and Environmental Control, Unpublished Opinion No. 2015-UP-269 (Ct. App.2015).

In an unpublished opinion, the Court of Appeals upheld the adjacent landowner, Grand Bees Development, LLC's challenge to DHEC's granting of a permit modification for the expansion of the Bee's Ferry Landfill, owned and operated by Charleston County. Petitioner successfully challenged DHEC's initial approval on the grounds that Charleston County had failed to obtain a "special exception" under the applicable zoning ordinances. Charleston County then amended its zoning ordinances to remove the requirement. DHEC again granted the permit modification, which petitioner also appealed on the grounds that Charleston County had not complied with a county ordinance, adopted in 1974, providing minimum standards for the operation of landfills, specifically that the operation of landfills "[c]onform with the surrounding environment" and "[c]onform with

future development of the area." Charleston County argued that the zoning and land development regulations addressed the same substantive requirements, and thus DHEC's determination also addressed the 1974 ordinance. The ALC determined that the zoning and land development regulations did not include similar language, and thus DHEC's consistency determination was not sufficient. The Court of Appeals affirmed.

Chestnut v. AVX Corporation, 413 S.C. 224, 776 S.E.2d 82 (2015).

A three-Justice majority (Pleicones, Beatty, and Hearn) of the South Carolina Supreme Court reversed the dismissal of a negligence claim brought by a class of plaintiffs who alleged "stigma damages" to their properties as a result of contamination on adjoining real properties. The plaintiffs did not allege actual contamination on their own properties, but rather that contamination by allegedly "harmful" and "dangerous" chemicals on adjoining properties rendered their own properties "worthless," "damaged" and "devalued." The Supreme Court reversed the lower court's dismissal of the negligence claim on the ground that the claim raised a novel question of South Carolina law, namely whether South Carolina recognizes environmental "stigma" damages. Without deciding the issue, the Court reasoned that further development of the facts on remand may allow the Court to decide whether to adopt a "no stigma damages rule," an "all stigma damages rule" or a modified rule. The dissenting justices (Toal and Kittredge) concluded that the negligence claim should have been dismissed.

Sierra Club v. South Carolina Department of Health and Environmental Control and Chem-Nuclear Systems, LLC, (S.C. Ct. App. 2015).

This case was before the Court of Appeals for the second time, having reviewed and affirmed-in-part and remanded-in-part a previous order of the ALC reviewing a 2000 decision of DHEC to renew its license to operate. The ALC originally upheld the 2004 renewal in a 2005 order. The Court of Appeals reviewed the 2005 order and remanded to the ALC to determine whether Chem-Nuclear had complied with certain subsections of S.C. Code Reg. 61-63. On remand, the ALC affirmed DHEC's determination that Chem-Nuclear had complied with the regulations. In this 2015 decision, the Court of Appeals affirmed the decision of the ALC except with respect to four subsections of S.C. Code Reg. 61-63. The Court of Appeals held that DHEC failed to enforce these four subsections. Because the appellant informed the court at oral argument that it did not seek revocation of the license, the Court of Appeals remanded to DHEC to consider all information, including information subsequent to the 2005 order, to determine whether or not Chem-Nuclear has fully complied with the regulations. Chem-Nuclear has petitioned for Writ of Certiorari of the Court of Appeals' decision, which petition is currently pending.

Azar v. City of Columbia, 414 S.C. 307, 778 S.E.2d 315 (2015).

The Supreme Court reversed the trial court's grant of summary judgment in favor of the City of Columbia and remanded the case for consideration of the plaintiff's claim that the City of Columbia's practice of transferring water and sewer revenues to its General Fund for business and economic development expenditures was prohibited under S.C. Code Ann. §§ 6-1-330 and 6-21-440. Section 6-1-330 requires that public revenues derived from fees imposed to finance the provision of public services must be used to pay costs related to the provision of the service. The Court found unconvincing the trial court's reasoning that sewer and water fees were not "imposed" because the service arrangement is contractual, and remanded for consideration the question of whether the

business development expenditures were sufficiently related to the provision of sewer and water services as to be lawful. The Court also found a genuine issue of material fact as to whether the City complied with Section 6-21-440 of the Revenue Bond Act, which imposes an order on the expenditure of service fees and requires the payment of various debts and operating costs before the discretionary use of surplus revenues.

Deerfield Plantation Phase II Property Owners Association v. S.C. Department of Health & Environmental Control, 414 S.C. 170, 777 S.E.2d 817 (2015).

A property owners association appealed the ALC's order upholding DHEC's issuance of an NPDES permit to a developer who required a new stormwater management system to redevelop a golf course into a residential subdivision. The ALC agreed with the property owners association that existing stormwater drainage ponds were "waters of the State" but rejected its arguments that the ponds were in violation of the discharge pretreatment requirement under Regulation 61-68(E)(4) merely because such ponds do not pretreat stormwater. On appeal, the Supreme Court affirmed the ALC. The Court reasoned that: 1) the language of Regulation 61-68(E)(4) requires "treatment and/or control" of effluent; 2) the Regulation suggests that DHEC may require the implementation of a Best Management Practice for stormwater discharge; and 3) the construction of detention dams, a Best Management Practice to temporarily store and control stormwater runoff, satisfies the requirements of the Regulation. The Court also rejected property owners association's argument that the declaration of federal jurisdiction over a small portion of the waters on the redevelopment site subsequent to the ALC order requires a new NPDES permit. The Court referred to and affirmed the conditions of the permit, which allow the sustaining of permit coverage for the remaining portion of the site unaffected by the federal assertion.

South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control and Oakridge Landfill, LLC, 14-ALJ-07-0221-CC (Anderson, J.) (Oct. 15, 2015).

Contested case challenging the 401 Certification issued by DHEC for the expansion of an existing and active landfill site owned and operated by Oakridge in Dorchester County. The proposed expansion was initiated in order to meet the projected demand for landfill space. The ALC conducted a five-day contested case and upheld DHEC's decision to issue a 401 Certification and Coastal Zone Consistency Certification for the project on the merits, but also found the Coastal Conservation League lacked associational standing to bring the claim. The ALC's order was appealed to the Court of Appeals, but on motion of the parties, all briefing deadlines are being held on abeyance based on the parties' representation to the Court that a settlement has been reached.

FEDERAL CASES:

LWD PRP Group v. Alcan Corp. et al., 600 Fed.Appx. 357 (6th Cir. 2015).

Question of whether 3 year statute of limitations on removal action runs from date settlement becomes effective, or date upon which removal is completed. The Court concluded, based on *Hobart Corp. v. Waste Management of Ohio, Inc.* that the settlement date controls.

Sierra Club v. ICG Hazard, LLC, 781 F.3d 281 (6th Cir. 2015).

Coal mining company's general discharge permit provides "permit shield" coverage for selenium discharges. Court upheld District Court reasoning that even though the general permit did not set limits for selenium discharges, ICG could lawfully discharge provided it made proper disclosures. As a result, ICG was also protected from liability for violation of state water quality standards under the Surface Mining Act; otherwise, the district court reasoned, the water quality standards would "supersede" the permit shield.

Vine Street LLC v. Borg-Warner, 776 F.3d 312 (5th Cir. 2015).

Arranger liability case. Seller of dry cleaning equipment and initial supply of PCE to dry cleaners was not liable as arranger. The key question in arranger cases is intent to dispose. The fact that the manufacturer/seller knew that some PCE would escape the oil/water separator and inevitably enter the sewer did not mean that it intended to dispose of a waste.

Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F.Supp.3d 1180 (E.D. Wash. 2015).

Environmental NGOs filed suit claiming animal waste recycling practices are illegal "open dumping" under RCRA, constitute "imminent endangerment" under RCRA, can be considered "solid waste" under RCRA, and whether manure processers were responsible parties for the purpose of a RCRA citizen's suit. The court found no genuine issue of material fact that Defendants' application, storage, and management of manure at the Defendant's dairy violated RCRA's substantial and imminent endangerment and open dumping provisions and that all Defendants- operators, property owners, and executives were "responsible parties" under RCRA. Defendants then moved for an interlocutory appeal and a stay, both of which were denied.

Kansas v. Nebraska and Colorado, 135 S.Ct. 1042 (2015).

In a case brought in the United States Supreme Court's original jurisdiction, the Court ruled Nebraska violated a compact apportioning the waters of the Republican River between Kansas, Nebraska, and Colorado, and ordered Nebraska to pay Kansas $1.8 million in disgorgement. The case centered on the Court's power to order an equitable remedy for breach of a compact between states.

Yates v. United States, 135 S.Ct. 1074 (2015).

United States Supreme Court ruled that a fisherman could not be prosecuted under the Sarbanes-Oxley Act for destruction of undersized fish. Prosecutors had charged Mr. Yates with violation of Sarbanes-Oxley, a broad statute designed to protect investors by improving the accuracy and reliability of corporate disclosures. A conviction under Sarbanes-Oxley carries a potential sentence of 20 years for any person who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation." The Court ruled that fish are not a "tangible object" within the purview of the statute.

Landmark Legal Found. v. EPA, 82 F.Supp.3d 211 (D.D.C. 2015).

The federal district court for the District of Columbia refused to grant spoliation sanctions against EPA for its handling of a FOIA request filed by a politically conservative public interest law firm. Despite declining to award sanctions, however, in the 25-page opinion the court described numerous examples to support its statement that "[e]ither EPA intentionally sought to evade Landmark's lawful FOIA request so the agency could destroy responsive documents, or EPA demonstrated apathy and carelessness toward Landmark's request."

Bd. of Comm'rs of the Southeast La. Flood Prot. Auth. – East v. Tennessee Gas Pipeline Co., LLC, 88 F.Supp.3d 615 (E.D. La. 2015).

The Southeast Louisiana Flood Protection Authority (Authority), which also serves as the board governing three south Louisiana Levee Districts, sued 88 oil and gas Defendants, claiming that the Defendants' oil and gas activities in the "Buffer Zone" have led to coastal erosion, making south Louisiana more vulnerable to severe weather and flooding. The court ruled that the Rivers and Harbors Act, the Clean Water Act, and the Coastal Management Act imposed no duty on Defendants to protect Authority from the alleged harm. Additionally, the court found that the various United States Army Corps of Engineers permits issued to the Defendants were not contracts, and even if they were, the Authority was not an intended beneficiary of those permits.

Nucor Steel-Arkansas v. Big River Steel, LLC, 93 F.Supp.3d 983 (E.D. Ark. 2015).

An Arkansas judge dismissed a Clean Air Act citizen suit filed by Nucor seeking to overturn a Title V permit issued to Big River Steel. Nucor had challenged the permit through the Arkansas administrative process and lost, then filed an appeal of the administrative decision. Nucor also petitioned EPA to object to the permit and filed suit in D.C. federal court when EPA failed to act. The Arkansas federal court ruled that the citizen suit provisions of the Clean Air Act could not be used to collaterally attack a Title V permit. An appeal has been filed.

Citizens for Pennsylvania's Future v. Ultra Resources, Inc., 2015 WL 769757 (M.D. Pa. 2015).

The court ruled that Ultra Resources' compressor stations were not "adjacent" within the meaning of the Clean Air Act, so emissions from the stations were not required to be aggregated for purposes of determining whether they were a major source. The court relied on *Summit Petroleum v. EPA*, 690 F.3d 733 (6th Cir. 2012), and guidance promulgated by the Pennsylvania Department of Environmental Protection (DEP) after the Summit decision was released, stating the plain meaning of "contiguous" and "adjacent"" should control the determination. However, because DEP had issued guidance suggesting it would conduct a case by case analysis of the functional interrelatedness of facilities, and because state law may be more stringent than federal law, the court declined to hold that functional interrelatedness "can never lead to, or contribute to, a finding of contiguousness or adjacency."

PCS Nitrogen, Inc. v. Ross Development Corp., 2015 WL 5122878 (D.S.C. 2015).

In the latest installment of the *Ashley II* saga, the District Court of South Carolina ruled that all distributions to shareholders of Ross Development between 1998 and 2006 (totaling nearly $5 million) were void and subject to a constructive trust until the court determines what Ross owes PCS Nitrogen for the contamination. Ross had operated a fertilizer plant until 1966, then sold the property to PCS.

Ross began the corporate dissolution process in 1982, but was still disposing of assets in 1998 when it first learned of its potential liability for contamination at the site. The first cost recovery suit was filed in 2005; Ross was sued in November 2006, and one day later authorized a final liquidating distribution to shareholders.

Precon Development Corp. v. U.S. Army Corps of Engineers, 603 Fed.Appx. 149 (4th Cir. 2015).

The Fourth Circuit Court of Appeals upheld the Corps' finding that a 4.8 acre wetland had a "significant nexus" to navigable waters under the Clean Water Act. The decision applies the "significant nexus test" of Corps jurisdiction from Justice Kennedy's opinion concurring in the judgment in *Rapanos v. United States*, 547 U.S. 715 (2006). The Fourth Circuit had previously found a "nexus" between Precon's 4.8 acre wetland and navigable waters seven miles away and allowed aggregation of the 4.8 wetland acres with a region of 448 "similarly situated" wetlands, but remanded for a determination of whether the nexus was "significant." On remand the Corps presented evidence of a relationship of wetland functions to downstream receiving water impairments and common wildlife (wetland and non-wetland) usage to establish a "significant nexus" between the 4.8 acre wetland and navigable waters.

Hawkes Co. v. U.S. Army Corps of Engineers, 782 F.3d 994 (8th Cir. 2015).

The Eighth Circuit Court of Appeals held that a jurisdictional determination under the Clean Water Act regarding Minnesota wetlands is a final agency action subject to judicial review. Hawkes was seeking to mine peat from wetland property in northwestern Minnesota. The Corps made a preliminary determination that the property at issue contains jurisdictional wetlands, and Hawkes filed an administrative appeal. The hearing officer concluded that the record did not support the determination and remanded to the district engineer. On remand, the district engineer found that the wetlands have a "significant nexus" to navigable waters and therefore require a Clean Water Act Section 404 permit. The companies then filed an action for judicial review in January 2013. Under prior decisions, a person who disagreed with the agency's determination had only two options: either go through the lengthy and expensive process of obtaining a CWA permit or proceed without a permit and risk incurring potentially enormous civil penalties for violation of the CWA before having a chance to challenge whether the CWA requirements should even apply. The Eighth Circuit held that CWA jurisdictional determinations are subject to "pre- enforcement" judicial review, a holding that conflicts with a case out of the the Fifth Circuit. In *Belle Co. LLC v. U.S. Army Corps of Engineers*, 761 F.3d 383, 78 ERC 1933, 2014 BL 210374 (5th Cir. 2014), the Fifth Circuit found that although the corps' jurisdictional determination marked the consummation of the corps' decision-making process, the decision was not reviewable.

Consolidation Coal Company v. Georgia Power Company, 781 F.3d 129 (4th Cir. 2015).

The Fourth Circuit Court of Appeals upheld a district court ruling that Georgia Power did not have intent to dispose of PCBs when it sold surplus transformers to Ward Transformer Company. The Fourth Circuit examined the transactions using the standing for determining CERCLA arranger liability under the 2006 Supreme Court decision in *Burlington Northern & Sante Fe Ry. Co. v. U.S.*, 556 U.S. 599 (2009), and the Fourth Circuit decision in *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir.1998). The plaintiffs argued that even though Georgia Power was selling transformer for value and Ward subsequently resold the transformers for a profit, Georgia

Power sold the transformers to Ward with a "secondary motive" to dispose of PCBs. The Fourth Circuit rejected plaintiffs' argument, finding that "intent to sell a product that happens to contain a hazardous substance is not equivalent to intent to dispose of a hazardous substance under CERCLA. For arranger liability to attach, there must be something more."

Perez v. Mortgage Bankers Association, 135 S.Ct. 1199 (2015).

United States Supreme Court held that the D.C. Circuit's 1997 decision in *Paralyzed Veterans of Am. v. Arena* is inconsistent with the text of the Administrative Procedure Act (APA). Under the "Paralyzed Veterans" doctrine, an agency had to comply with formal (and time-consuming) administrative procedures even when it claimed to be doing nothing more than interpreting existing rules, if the agency was *de facto* reversing its existing regulations. The Supreme Court found that the APA expressly exempts interpretive rules from notice-and-comment requirements, and the Court reasoned that that exemption applied equally when agencies amend or repeal existing interpretive rules. The Court held that the APA does not require a regulatory agency to adhere to notice-and-comment rulemaking when it issues a rule interpreting one of its formal regulations.

WildEarth Guardians v. United States Office of Surface Mining, Reclamation, and Enforcement, 104 F.Supp.3d 1208 (D. Colo. 2015).

The Court held that OSM violated NEPA when it approved the expansion of two Colorado mines. Agreeing with the environmental groups, the Court determined that OSM failed to seek public involvement during the review process, failed to publish notice of the resulting EAs and FONSIs, and failed to take the requisite "hard look" at the environmental impacts of the proposed expansions before issuing the FONSIs and approving the mining plans (specifically the generation of air pollutants during blasting and mining and the impacts of coal combustion on greenhouse gas emissions). OSM had argued primarily that 1) its role is simply to review approvals issued by the state and to do more would usurp the state's role as the regulating body (and thus a more minimal impact analysis was sufficient) and 2) any attempt to regulate air quality would be outside of its limited power to regulate surface mining and reclamation.

St. Bernard Parish Government v. United States, 121 Fed.Cl. 687 (Fed. Cl. 2015).

In a takings case filed by St. Bernard Parish and property owners in that parish and in the Lower Ninth Ward, the Court held that the U.S. Army Corps of Engineers' construction, expansions, operation, and failure to maintain the Mississippi River-Gulf Outlet (MR-GO) caused subsequent storm surges that were exacerbated by a "funnel effect" during Hurricane Katrina and subsequent hurricanes and severe storms. As determined by the Court, such conduct lead to the flooding of plaintiffs' properties that effected a temporary taking under the Fifth Amendment. According to the Court, plaintiffs held protectable property interests recognized under Louisiana law and had reasonable investment-backed expectations and also demonstrated that it was foreseeable to the Corps that their actions and inactions would substantially increase storm surge during hurricanes and other severe storms.

SC Coastal Conservation League v. U.S. Army Corps of Engineers, 789 F.3d 475 (4th Cir. 2015).

The Fourth Circuit Court of Appeals affirmed dismissal of a lawsuit filed by the Coastal Conservation League in South Carolina District Court the grounds that the claims were moot. Plaintiffs alleged that the US Army Corps and other regulatory agencies violated the Clean Water Act, the National

Environmental Policy Act and the Endangered Species Act by granting various approvals and authorizations to a property owner to convert a freshwater wetlands to a saltwater wetlands. The property owner specifically proposed to remove man-made earthen embankments that separated historical rice patties (fresh water wetlands) from a tidal salt marsh. After the complaint was filed in the matter, the property owner tested the salinity of water on both sides of the embankments and determined that the salinity in the historical rice patties exceeded the salinity in the tidal salt marsh. The District of South Carolina dismissed the case as moot on the ground that the harm the plaintiffs sought to prevent – *i.e.*, the intrusion of brackish water into the freshwater impoundments – had already occurred and the court could not provide meaningful relief to the plaintiffs. On appeal, the environmental group argued that the salinity in the historical rice patties could be reversed. The Fourth Circuit rejected this argument and affirmed dismissal on the grounds that the relief sought (*i.e.*, enjoining removal of the man-made embankments) would not prevent the alleged harm (*i.e.*, the water within the impounded area becoming more saline).

Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 2015 WL 4469765 (D.S.C. 2015).

Last year, the Supreme Court of South Carolina issued an order in response to a certified question of law from the United States District Court for District of South Carolina that a party's own acts of negligence do not bar him from seeking indemnification in a CERCLA action (in which strict liability is imposed against former owners of contaminated property), unless such intention is expressed in clear and unequivocal terms. In the underlying suit, PCS Nitrogen, Inc. ("PCS") sought indemnification from the prior owner of a fertilizer manufacturing site in Charleston, South Carolina for fees and costs associated with the prior owner's CERCLA liability. PCS purchased the site from Ross Development Corp. ("Ross") in 1966. Prior to the transfer, Ross manufactured fertilizer at the site. Following the transfer, PCS also manufactured fertilizer at the site for approximately 20 years before selling it to Ashley II of Charleston, Inc. ("Ashley II"). In July of this year, the District of South Carolina issued a final determination of indemnification damages in the matter of $745,898.86. This amount included a blanket, twenty percent (20%) reduction of the total fees claimed by PCS, which totaled over $930,000, to ensure that the fees claimed by PCS were reasonable. The Court reasoned that the blanket reduction was warranted because PCS's documentation of its fees contained block billing, billing in quarter-hour increments, billing for clerical tasks and excessively vague task descriptions. This order has been appealed.

Michigan v. US EPA, 135 S.Ct. 2699 (2015).

Twenty-three states challenged the validity of the EPA's air toxics regulations for power plants, commonly known as the Mercury and Air Toxics Standards (MATS) promulgated under Section 112 of the CAA. [42 U.S.C. § 7412] The Act provides that regulation of power plants is only permissible if EPA determines that "regulation is appropriate and necessary" after evaluating the hazards that power plants pose to public health. EPA conducted the evaluation under Section 112 of the CAA, determined that regulation of power plants was "appropriate and necessary" under the CAA because toxic emissions from power plants posted risks to human health and controls were available to reduce those emissions. EPA did not consider costs of control in its evaluation, and eventually promulgated MATS in 2012. EPA estimated that the cost of complying with MATS would be $9.4 billion per year and would result in quantifiable benefits between $4 to $6 million per year. Petitioners' challenged the validity of the rule on the ground that EPA's "appropriate and necessary" evaluation was flawed and

unreasonable because it failed to consider costs of emissions controls. The United States Supreme Court agreed in a 5-4 opinion delivered by Justice Antonin Scalia. The Court held that federal administrative agencies must engage in "reasoned decision-making," which requires the agency to consider all relevant factors, including costs of compliance. Justice Kagan filed a dissenting opinion, in which Justices Ginsburg, Breyer and Sotomayor joined.

In re Murray Energy Corp., 788 F.3d 330 (D.C. Cir. 2015).

The D.C. Circuit Court denied the petition of twelve states (including South Carolina) and a coal company challenging EPA's *proposed* climate change regulations, commonly referred to as the "Clean Power Plan" ("Proposed CPP"). Petitioners alleged that EPA improperly asserted that it had the authority to promulgate the Proposed CPP under Section 111(d) of the CAA. The Proposed CCP aimed to reduce carbon dioxide ("CO2") emissions from existing power plants by 30% from 2005 levels by 2030. Petitioners challenged EPA's claim that Section 111(d) of the CAA authorized the Proposed CCP. Section 111(d) is a seldom-used provision that allows EPA to establish "emissions guidelines," which guidelines the States then use to establish and implement emissions standards. The Court held that the Proposed CPP was not a final agency action, and therefore was not reviewable by the Court pursuant to Administrative Procedures Act. [5 U.S.C. § 704]

On August 3, 2015, President Obama and EPA announced that the Clean Power Plan became final. Thereafter, on October 23, 2015, 24 states, led by West Virginia and including South Carolina, filed a lawsuit in the U.S. District Court D.C. Circuit against the EPA challenging the EPA's Clean Power Plan, which went into effect on that day. A total of 19 petitions were filed, including others by business groups including the United States Chamber of Commerce and utility and coal industry groups. Late in October, the D.C. Circuit Court consolidated the petitions into a single challenge.

Gunpowder Riverkeeper v. Fed. Energy Regulatory Comm'n, 807 F.3d 267 (D.C. Cir. 2015).

The D.C. Circuit denied an environmental group's petition challenging a certificate of public convenience and necessity ("CPCN") issued by the Federal Energy Regulatory Commission ("FERC") that conditionally authorized the extension of a natural gas pipeline in Maryland. Petitioner alleged violations of the CWA and NEPA. The Court held that the Petitioner had standing to challenge the CPCN because members of the environmental group had property that was subject to eminent domain proceedings as a result of the pipeline extension. However, the Petitioner only asserted an interest in avoiding harm to its members' property rights. The D.C. Circuit held that the alleged harm to members' property interest were economic interests that fell outside the zone of interest of the CWA and NEPA. Because the Petitioner did not allege environmental harm, their claims fell outside the zone of interests protected by the environmental statutes, and the petition was denied.

North Dakota et al. v. U.S. Environmental Protection Agency et al., 2015 WL 7422349 (D.N.D. 2015).

On August 27, 2015, the United States District Court for the District of North Dakota granted a preliminary injunction to enjoin the implementation of the "Clean Water Rule: Definition of Waters of the United States." The motion for preliminary injunction was made by the Plaintiffs, North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, and the New Mexico State Engineer. In the order granting the preliminary injunction, the Court held that original jurisdiction rests with the

district court and not the court of appeals, because the Clean Water Rule has "at best only an attenuated connection to any permitting process."

United States v. Lipar, 2015 WL 7681272 (S.D. Tex. 2015).

The United States District Court for the Southern District of Texas issued an order that included sanctions against the EPA. The EPA brought suit against a real estate developer for filling wetlands. The court found that the EPA had not produced any evidence of jurisdictional wetlands in the ten (10) years that the EPA had investigated and prosecuted the case. The court also found that more than eighty percent (80%) of the documents over which the EPA asserted privilege were not privileged and that the EPA produced other documents unrelated to the case. As a result of discovery violations, the court ordered EPA to pay the defendant's reasonable attorney's fees in defending the suit.

Sierra Club v. U.S. Army Corps of Engineers, 803 F.3d 31 (D.C. Cir. 2015).

The court affirmed the district court's rejection of the Sierra Club's claims that the federal government was required under NEPA to conduct a review of environmental impacts of the Flanagan South oil pipeline considered in its entirety, stretching 593 miles from Illinois to Oklahoma and including portions not subject to federal control or permitting, and that to examine the impacts of the pipeline's water crossing only by region is insufficient. The court found that the federal agencies were required only to conduct NEPA analysis of the foreseeable effects of regulatory actions (easements, CWA verifications, endangered species takings authorizations) which were limited to discrete segments of the pipeline comprising less than five percent of the overall length.

Natural Resources Defense Council v. United States Environmental Protection Agency, 808 F.3d 556 (2nd Cir. 2015).

The Second Circuit remanded to the EPA portions of its 2013 general NPDES permit for ship ballast water. The court found that the EPA's rule failed to reflect best achievable technology—specifically the availability of onshore treatment—and instead based its rule on a maritime organization standard without adequate explanation for its decision to do so.

In re: Environmental Protection Agency, 803 F.3d 804 (6th Cir. 2015).

Clean Water Rule case: Definition of Waters of the United States. The Sixth Circuit Court of Appeals issued a nationwide stay enjoining the implementation of the EPA's "waters of the United States" rule pending the court's determination as to whether it has subject matter jurisdiction to review the rule.

SOUTH CAROLINA LEGISLATIVE UPDATE

Five-Year Sunset on Regulations

The House Labor, Commerce and Industry Committee amended H.3006, a bill that sunsets state regulations after five years, and then favorably approved the bill. The amendment applies the sunset to regulations promulgated after the effective date of the bill.

This bill does not provide a new procedure for re-promulgating the regulations, except going through the full 12 month promulgation process, which would likely mean that agencies would have to add additional staff to work on promulgating and re-promulgating regulations. The proposed sunset would

also likely create uncertainty as changes to regulations which, in turn, might negatively impact economic development.

The bill passed the House following third reading and vote, and was sent to the Senate. The bill was introduced and read for the first time and then referred to the Senate Judiciary Committee, where it was placed, along with numerous other regulatory reform bills, into a subcommittee. The bills sent to the subcommittee include H.3006, S.93, S.283, S.297, and S.425.

DHEC Board Review

Legislation (S.228) was introduced which would eliminate the DHEC Board from the permit appeals process and send appeals directly to the Administrative Law Court. Elimination of board review would shorten the time in a contested case by as much as 120 days. A House version of the bill, H.3370, was also introduced and referred to the Judiciary Committee. Neither S.228 nor H.3370 made the May 1 crossover deadline for the 2014/15 Legislative session. S.228 remains on the Senate Calendar. H.3370 remains in the House Judiciary Committee.

Smith Land II/PCA Bill

This bill aims to close a loophole in the PCA Bill exploited by environmental groups to challenge non-permitted releases into the environment. After a big push by the business community, S.229, the Smith Land II bill, was amended, received third reading in the Senate, and was sent to the House. The bill was read for the first time in the House on April 30, 2015. An amendment to the originally filed bill would still allow lawsuits related to the Pinewood Landfill and coal ash. A House version of the bill, H.3371, remains in the House Judiciary Committee. Action is likely to take place in the current legislative session.