



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
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ATLANTA, GEORGIA 30303-8960

OCT 30 2015

Donald R. van der Vaart, Secretary
North Carolina Department of
Environmental Quality
1601 Mail Service Center
Raleigh, North Carolina 27699-1601

Re: Adequacy of North Carolina CWA and CAA Programs in Light of Constraints on Citizen
Access to Judicial Review of Permits

Dear Mr. van der Vaart:

The purpose of this letter is to bring to your attention the U.S. Environmental Protection Agency's concerns regarding recent state Administrative Law Judge (ALJ) and Superior Court decisions which limit citizen access to judicial review of environmental permits in North Carolina. More particularly, we want to emphasize the potential implication of those decisions on the adequacy of the State's federally authorized administration of the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) and Clean Air Act (CAA) permitting programs. One of the ALJ decisions relates to a CWA/NPDES Permit for the Martin Marietta Materials, Inc., Vanceboro Quarry (Permit Number NC0089168), which discharges pollutants to Blounts Creek. The other ALJ decision and the Superior Court decision relate to a CAA/PSD permit for the Titan Cement facility proposed by Carolinas Cement Company (Air Quality Permit No. 07300R11).

Both the CWA and CAA establish minimum requirements for providing citizens with judicial access to appeal permits. Such access is a critical component of adequate state CWA and CAA permitting programs, and must be provided by states seeking authorization from EPA to implement these programs pursuant to federal environmental laws. As explained below, the recent ALJ and Superior Court decisions cast serious doubt on whether North Carolina's authorized NPDES and CAA/PSD programs can satisfy the minimum requirements for citizen access to judicial review of environmental permits going forward.

The recent ALJ decisions in both the permit appeals, and the Superior Court decision in the Titan permit appeal matter, interpret provisions of North Carolina's Administrative Procedure Act (NCAPA) in ways that may unduly restrict the ability of citizens to pursue judicial appeal of state-issued NPDES and CAA/PSD permits. The NCAPA is a state law, and the EPA has no basis to, or interest in, challenging state administrative or judicial interpretations of that law. However, the impact of these interpretations on the implementation of federal environmental statutes is a matter to be addressed by the EPA pursuant to the oversight authority the Agency retains over North Carolina's NPDES and CAA permitting programs.

Under Section 402(c)(3) of the CWA, the EPA has authority to withdraw a state's NPDES program authorization if the state is not implementing its program in accordance with federal statutory requirements. Section 110 of the CAA authorizes the EPA to require a state to revise its state implementation plan (SIP) if the SIP-approved PSD program is not in compliance with CAA requirements (Section 110(k)(5)), and to disapprove the PSD program if the original SIP approval action is found to be in error (Section 110(k)(6)). To the extent that the recent interpretations of the NCAPA negatively impact North Carolina's title V permitting program, the EPA is likewise authorized under the CAA to take action to address such program deficiencies. Specifically, under Section 502(i) of the CAA, the EPA is authorized to make a determination that the state is not adequately administering its title V program, which triggers mandatory sanctions (statewide highway sanctions and offsets in nonattainment areas) 18 months after the determination and, if the deficiency is not corrected, mandates the imposition of a federal Part 71 permit program in the state within 24 months of the determination.

It is our understanding that the ALJ and Superior Court decisions in the Titan matter have been appealed to the State Court of Appeals, while the ALJ decision in the Blount Creek matter has been reversed by the Superior Court and remanded for further proceedings. Thus, we recognize that the issues regarding citizen access to judicial appeal of environmental permits, which are the subject of our concerns, are still in flux within the state judicial system.

However, in the spirit of no-surprises between our agencies, we must advise you that, should North Carolina appellate courts affirm decisions that limit citizen permit appeal rights in a manner which does not meet federal requirements, North Carolina's authorization to implement CWA and CAA permitting programs will be in jeopardy, with little prospect for remedying deficiencies without legislative action. Should such a situation occur, the EPA will need to engage quickly with you and the North Carolina Attorney General's Office to discuss the impact on your CWA and CAA authorizations as well as the steps the EPA will take in light of these impacts.

Should you or your staff have any questions, or wish to discuss our concerns in more detail, please do not hesitate to contact me at 404-562-8357, or our Regional Counsel, Mary Wilkes at 404-562-9556.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather McTeer Toney", with a long horizontal flourish extending to the right.

Heather McTeer Toney
Regional Administrator