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Recent environmental and energy legal news of interest

This newsletter will describe some recent environmental and energy legal developments that should be of interest for Godfrey & Kahn clients and friends.

Recent United States Supreme Court case may provide basis for supporting conservation ordinances

On June 23, 2017, the United States Supreme Court upheld a strict shoreline development and conservation ordinance against a claim by property owners for just compensation for the loss of the ability of the owners to develop a portion of the property. [*Murr v. Wisconsin* 582 U. S. \(2017\)](#). In that case, the local regulation prohibited a parcel from being subdivided into two separate parcels and the sale of the undeveloped, subdivided parcel. The avowed purpose of the ordinance was to reduce substandard lots and preserve scenic beauty along the lower St. Croix River.

The Court engaged in a fact intensive review and upheld the ordinance from the takings claim. While there is no “bright line” test for upholding similar land use and conservation ordinances, local governmental authorities who are considering imposing regulations to prevent more intensive use of property should carefully consider the analysis in this Supreme Court decision when crafting such ordinances.

Recent waste water developments of interest

1. Nutrient variance litigation

On Feb. 6, 2017, the United States Environmental Protection Agency (US EPA) approved Wisconsin’s multiparty variance regulation. The Wisconsin variance authorizes Wisconsin Pollutant Discharge Elimination System (WPDES) permit holders to obtain a 10-year extension from water quality-related phosphorus limitations if the discharger meets certain economic impact tests. The qualifying permit holders also must be willing to pay \$50 per pound for phosphorus discharged each year and meet technology-based limits during the variance period. EPA Evaluation of Phosphorus Loading Reductions Likely to be Achieved Under Wisconsin [MDV, WQSTS #WI2016-668](#), Date: Feb. 6 2017.

In Upper Missouri Waterkeeper v. United States Environmental Protection

Agency et al, No. 16-52 (D. Mont. filed May 31, 2016), environmentalists claim that EPA's approval of Montana's water quality standards that allow general variances of up to 20 years is not adequately supported by science and, therefore, is arbitrary, capricious and an abuse of discretion under the Federal Administrative Procedures Act. The District Court in Montana is currently considering this challenge to the Montana variance program, and a decision is expected on this challenge within the next year.

Parties interested in utilizing the Wisconsin multiparty variance discharger program should watch closely the litigation pending in federal court in Montana. In particular, Wisconsin parties should monitor that Court's decision for possible application to Wisconsin's variance program.

2. EPA reinstates the Obama administration's rule regulating dental amalgam

The EPA has agreed to reinstate its Clean Water Act rule limiting releases of amalgam discharges from dental offices into publically owned treatment facilities. This reinstatement decision was recently announced by the EPA after the Natural Resource Defense Council sued the US EPA claiming that the Trump administration unlawfully opposed the implementation of this Obama era rule.

Under this rule, the agency will finalize technology-based standards that must be met by dental offices generating such amalgam waste streams before discharging that waste into publically owned treatment works (POTWs). Once the rule is finalized, POTWs will be required to implement local ordinances to enforce such pretreatment standards.

Harvard health study confirms adverse health effects of airborne fine particulate matter and ozone

On June 28, 2017, the Harvard T. H. Chan School of Public Health issued the results of a new study of 60 million Americans, focusing primarily on a population which was 65 years and older. The Harvard study concludes that long-term exposure of the airborne fine particulate matter and ozone increases the risk of premature death even when that exposure is below the current national ambient air quality standards for those contaminants. In particular, the study indicates that if the particular standards would be lowered by just 1 µg per cubic meter nationwide, 12,000 lives could be saved every year. In addition, the study concluded that if the level of ozone could be lowered by just one part per billion nationwide, about 1,900 lives will be saved each year.

Under this 2015 ozone standard, US EPA reduced the standard from 75 ppb to 70 ppb. On June 6, 2017, US EPA [issued a statement](#) that it was delaying its preliminary attainment/nonattainment designations under the new more stringent standard for at least one year. In addition, US EPA created a task force to review the implementation of the new ozone standard.

It is obvious that the Harvard study will be "front and center" in the current controversy surrounding the implementation of the 2015 ozone standard.

New Wisconsin proposed legislation would create renewable energy credits for waste heat facilities

A new bill that passed both houses of the Wisconsin State Legislature and is awaiting the governor's signature would create renewable resource credits for industrial processes that employ waste heat for reuse within the facility to meet energy needs. [2017 Wis. SB-144](#). Under Wisconsin's existing "renewable portfolio standards" (RPS) utilities must meet 10% of their customers' electrical energy needs by the following means: (1) using qualified

renewable energy to meet their customers' energy need, and/or (2) purchasing credits from owners of qualified renewable energy sources.

When this legislation is finalized, it would place waste heat in the same category as wind and solar with respect to types of energy projects which qualify for renewable resource credits under this program for Wisconsin utilities.

It is important to note that all Wisconsin-based utilities have met the current 10% Renewable Portfolio Standard (RPS) requirement. Nonetheless, this new proposed designation for waste facilities, when finalized, could be valuable in the future should those RPS requirements become more stringent for Wisconsin utilities.

In addition, this new legislation could provide a standard for Wisconsin-based companies that utilize waste heat facilities to tout the sustainable feature of this process.

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