



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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October 29, 2010

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The Honorable Jill H. Vogel
Member, Senate of Virginia
Post Office Box 2337
Winchester, Virginia 22604

Dear Senator Vogel:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether three Virginia Pollution Abatement permits recently issued by the State Water Control Board (the "Board") are valid.

Response

It is my opinion that one permit is valid and not subject to appeal. The other two are being appealed as to one clause; unless the court should stay, suspend, or set aside one or both of these permits as to that clause, each remains valid and enforceable.

Background

At its June 21-22, 2010 meeting, the Board considered applications from Recyc Systems, Inc. ("Recyc"), Synagro Technologies, Inc. ("Synagro"), and Nutri-Blend, Inc. ("Nutri-Blend") for Virginia Pollution Abatement Permits to land apply sewage sludge. On June 22, 2010, the Board voted to issue the permits.

In each case, the Board adopted findings¹ that concluded

[T]he permit has been prepared in conformance with all applicable statutes, regulations and agency practices;

[T]he limits and conditions in the permit have been established to ensure that pollutant management and land application is performed in a manner that will protect public health and the environment and that the escape, flow or discharge of pollutants into state waters is prevented; and

[A]ll public comments relevant to the permit have been considered.

¹See Minutes of the State Water Control Board, June 21-22, 2010, available at http://townhall.virginia.gov/L/GetFile.cfm?File=E:\townhall\docroot\Meeting\103\14194\Minutes_DEQ_14194_v1.pdf.

Recyc and Synagro filed timely appeals.² No notice of appeal of the Nutri-Blend permit has been received by the Board, and no petition for appeal has been filed.

The pending appeals challenge a provision the Board added to each draft permit that requires the permittee to notify the Board if the land to which sludge has been applied is sold within the 38-month period during which food crops with subsurface harvested parts may not be harvested from land where certain sludges have been applied.³ These appeals do not otherwise challenge the validity of the permits.

Applicable Law and Discussion

Section 62.1-44.19:3(A)(3) provides:

No person shall contract or propose to contract, with the owner of a sewage treatment works, to land apply, market or distribute sewage sludge in the Commonwealth, nor shall any person land apply, market or distribute sewage sludge in the Commonwealth without a current Virginia Pollution Abatement Permit authorizing land application, marketing or distribution of sewage sludge and specifying the location or locations, and the terms and conditions of such land application, marketing or distribution. The permit application shall not be complete unless it includes the landowner's written consent to apply sewage sludge on his property.

Section 62.1-44.19:3(B) requires the Board, with the assistance of the Department of Conservation and Recreation and the Department of Health to adopt regulations to ensure that:

(i) sewage sludge permitted for land application ... is properly treated or stabilized; (ii) land application ... of sewage sludge is performed in a manner that will protect public health and the environment; and (iii) the escape, flow or discharge of sewage sludge into state waters, in a manner that would cause pollution of state waters ... shall be prevented.

Section 62.1-44.19:3(C) further requires that those regulations include, among other things,

3. Standards for treatment or stabilization of sewage sludge prior to land application, marketing or distribution;
4. Requirements for determining the suitability of land application sites and facilities used in land application, marketing or distribution of sewage sludge;
5. Required procedures for land application, marketing, and distribution of sewage sludge;
6. Requirements for sampling, analysis, recordkeeping, and reporting in connection with land application, marketing, and distribution of sewage sludge;

² Recyc Sys., Inc v. State Water Control Bd., No. CL10000401-00 (Cir Ct. Culpeper Co., filed Aug. 19, 2010); Synagro Technologies, Inc. v. State Water Control Bd., No. CL10000415-00 (Cir. Ct. Culpeper Co., filed Aug. 26, 2010).

³ See 9 VA. ADMIN. CODE § 25-32-620 (regulation restricting access to agricultural lands where biosolids have been applied to the soil, the longest waiting period being that "food crops with subsurface harvested parts shall not be harvested for 38 months following application").

7. Provisions for notification of local governing bodies . . . ;
8. Requirements for site-specific nutrient management plans, which shall be developed by persons certified in accordance with § 10.1-104.2 prior to land application for all sites where sewage sludge is land applied, and approved by the Department of Conservation and Recreation prior to permit issuance under specific conditions; . . .
10. Procedures for receiving and responding to public comments on applications for permits and for permit amendments authorizing land application at additional sites.

The current regulations are codified at § 25-32-310 *et seq.* of Title 9 of the *Virginia Administrative Code*.⁴ The Board now is considering proposed amendments to those regulations,⁵ and citizens may participate in the public comment process under the Administrative Process Act.⁶

Section 2.2-4001 of the *Virginia Code* defines “case decision” as “any agency proceeding or determination that ... a named party ... is ... in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.” The Board’s June 22, 2010 findings and permit issuance constitute a case decision. Case decisions may be appealed by any “party aggrieved,” provided such appeals are taken “in the manner provided by the rules of the Supreme Court of Virginia.”⁷ Supreme Court Rule 2A:2 requires a party appealing a case decision to file a notice of appeal within thirty days of notice of the decision; Rule 2A:4 requires a petition for appeal to be filed within thirty days of filing of the notice of appeal. These filing deadlines are mandatory and jurisdictional.⁸

Section 2.2-4028 provides:

When judicial review is instituted or is about to be, the agency concerned may, on request of any party or its own motion, postpone the effective date of the regulation or decision involved where it deems that justice so requires. Otherwise the court may, on proper application ..., issue all necessary and appropriate process to postpone the effective dates or preserve existing status or rights pending conclusion of the review proceedings if the court finds the same to be required to prevent immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only substantial but that there is probable cause for it to anticipate a likelihood of reversible error in accordance with § 2.2-

⁴ The Office of the Attorney General historically has declined to render official opinions when the request involves a question of fact rather than one of law. *See, e.g.*, 2002 Op. Va. Att’y Gen. 64, 66; 1997 Op. Va. Att’y Gen. 1, 3, and prior opinions cited therein. The determination of whether specific permits issued by the Board conform to the Board’s regulation is a factual one that is beyond the scope of an official opinion of the Attorney General. Furthermore, this Office has declined to issue an opinion concerning a matter currently in litigation. *See, e.g.*, 2009 Op. Va. Att’y Gen. 138, 140. Consequently, I express no opinion here as to whether these permits in fact conform to the Board’s regulation.

⁵ *See* Proposed Amendment to Virginia Pollution Abatement Permit Regulation, *available at* <http://townhall.virginia.gov/L/viewstage.cfm?stageid=5374>.

⁶ *See* VA. CODE ANN. § 2.2-4007.03 (2008).

⁷ Section 2.2-4026.

⁸ *See Mayo v. Dep’t of Commerce*, 4 Va. App. 520, 522-23, 358 S.E.2d 759, 761 (1987) (timely petition for appeal is jurisdictional).

4027. Actions by the court may include (i) the stay of operation of agency decisions of an injunctive nature or those requiring the payment of money or suspending or revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely applications for renewal are duly determined by the agency.

Section 2.2-4029 provides:

Unless an error of law as defined in § 2.2-4027 appears, the court shall dismiss the review action or affirm the agency regulation or decision. Otherwise, it may compel agency action unlawfully and arbitrarily withheld or unreasonably delayed except that the court shall not itself undertake to supply agency action committed by the basic law to the agency. Where a regulation or case decision is found by the court not to be in accordance with law under § 2.2-4027, the court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law.

The permits in question were subject to appeal under the Administrative Process Act by a party aggrieved. In the course of an appeal, the court could issue a stay or could suspend or set aside the permit. The court has taken no such action in the instant cases. As such, as regards the Recyc and Synagro permits, unless the Board's decision is stayed as provided in § 2.2-4028 or reversed as provided by § 2.2-4029, that decision remains in effect and the permits remain in effect and enforceable.⁹ The Nutri-Blend permit, on the other hand, is a final decision of the Board with no timely appeal taken: the permit is valid by its terms until it expires or until Nutri-Blend might surrender it.

Conclusion

Accordingly, it is my opinion that the Nutri-Blend permit is valid and not subject to appeal; and that, unless the court should stay, suspend, or set aside one or both of the other permits, each remains valid and enforceable.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

⁹I note, however, that only the notice provisions that are on appeal could be stayed or reversed; the remaining provisions of these permits are valid and enforceable.