Solar Electric Generation Facility: Supreme Court of Vermont Addresses Enforceability of Mitigation Guidance

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The Supreme Court of Vermont ("Supreme Court") in a December 2nd Opinion addressed a challenge to two guidance documents and a classification system issued by the Vermont Agency of Natural Resources ("ANR"). See *Otter Creek Solar LLC & PLH LLC v. Vermont Agency of Natural Resources, et al.*, 2022 WL 17366190.

A solar electric generation facility developer argued that the documents and classification system were unlawful and could not be relied upon by the ANR.

Otter Creek Solar, LLC ("Otter Creek") is developing a solar electric generation facility in Bennington, Vermont. PLH, LLC ("PLH") owns the project site.

Otter Creek and PLH (collectively, "Plaintiffs") filed a Complaint for Declaratory and Injunctive Relief against ANR and the Vermont Public Utilities Commission ("PUC") in the Chittenden Civil Division requesting the invalidation of three ANR policies which included:

- Guidance for Conducting Rare, Threatened, and endangered Plant Inventories in Connection with Section 248 Projects
- Guidance for Non-Native Invasive Plant Species Monitoring and Control in Connection with Section 248 Projects
- Classification System Ranking Plant Species as "Rare" or "Very Rare"

Plaintiffs argued that the guidance documents and classification system were de facto agency rules for determining whether impacts on plant species would be unduly adverse for purposes of § 248(b)(5).

The Plaintiffs' concern was apparently driven by their allegation that hundreds of the white arrow leaved aster (classified as very rare) had been found on the project site. As a result, ANR was stated to be seeking to force the Plaintiffs to adhere to its mitigation rules. They asserted that such requirements would increase the cost of construction and reduce the revenue they would receive from the project because of the reduction in the number of solar modules that would be built.

The Vermont Attorney General ("AG") moved to dismiss the Complaint.

The Civil Division ("lower court") subsequently determined that the challenged policies were not rules (i.e., did not have the force of law) and therefore they should be challenged in the underlying PUC proceeding or by petitioning ANR to amend or repeal the documents. Their Complaint was dismissed.

The Plaintiffs argued on appeal that the guidance documents and classification system were effectively rules because they prescribe and implement a policy intended to apply generally to renewable energy facilities and that the PUC treats them as binding in the proceedings.

The Supreme Court upholds the Civil Division. However, it does so by concluding the Plaintiffs were barred by the statute of limitations from challenging ANR's guidance documents and classification system in the declaratory judgment proceeding.

The Supreme Court notes that the guidance documents/classification system are not formal rules because they were not promulgated using the notice and comment procedure. It further states that even accepting the Plaintiffs' argument that the guidance documents/classification system violate rulemaking requirements and exceed statutory authority, they cannot be challenged in a declaratory judgment action because it has been more than a year since they took effect.

An action challenging an agency rule is required to be brought within one year after its effective date. The Supreme Court further rejects the Plaintiffs' argument that in the alternative they have a general common-law right to enjoin unlawful state action that adversely impacts them.

Despite the Supreme Court's upholding the Civil Division's ruling, it takes no position on the merits of Plaintiffs' claim that the ANR lacks the power to regulate plant species other than threatened or endangered species.

A copy of the Opinion can be downloaded here.