Updates
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D.C. Circuit Overturns EPA’s Coal Combustion Residuals Rule for Coal-Fired Power Plants

The U.S. Court of Appeals for the District of Columbia Circuit, on August 21, 2018, vacated much of U.S. EPA's final rule regulating the disposal of "coal combustion residuals" (CCR) at coal-fired power plants. The ruling has significant implications for the disposal of CCR materials at these power plants and likely limits the Trump administration's ability to loosen those regulations any further on remand and reconsideration.

Background

CCR materials include fly ash, bottom ash and boiler slag resulting from burning coal and are typically stored in landfills or surface impoundments at coal-fired power plants. EPA regulates the disposal of CCR because it contains contaminants harmful to human health and because of the threat of groundwater and surface water contamination from the landfills and impoundments in which the materials are stored.

Spurred in part by data showing actual and threatened contamination from these facilities, and by a catastrophic structural failure of an impoundment in Kingston, Tennessee on December 22, 2008, EPA proposed in 2010 and later, on April 17, 2015, ultimately issued its final CCR rule regulating these waste streams under Subpart D of the Resource Conservation and Recovery Act.

In simplest terms, RCRA Subpart D prohibits "open dumps," which RCRA defines as sites where solid waste is disposed of in a way that doesn't comply with EPA regulations that ensure "no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 U.S.C. §§ 6944(a), 6903(14), (26).

After a somewhat protracted rulemaking history, environmental and industry groups challenged the CCR rule in the D.C. Circuit. The court ultimately?and resoundingly?concluded that the CCR rule failed to meet RCRA's "no reasonable probability of adverse effects" standard, striking a heavy blow to an Obama-era regulation that the court said didn't go far enough to reduce the risk of leakage from these impoundments.

Environmental Petitioner Challenges

- **Existing Unlined Impoundments**. While the CCR rule requires that all new impoundments have an impermeable liner, the rule applies no such requirement to existing impoundments, which EPA says are 36% to 57% likely to leak to groundwater. Instead, the rule only requires semi-annual groundwater monitoring and then closure when leaks are discovered. According to the court, that could allow the contamination to continue undiscovered and unaddressed for several months. Even then, the closure process could take years. According to the court, this violated RCRA's "no reasonable probability of adverse effects" requirement.
- **Existing Clay-Lined Impoundments**. For similar reasons, the D.C. Circuit also said that EPA overstepped in allowing continued operation of clay-lined impoundments after leakage was discovered. According to the court, "[c]lay-lined units are dangerous..."; even with a 2-3-foot-thick clay liner, they still have a 10% chance of leaking. And owners get up to five months just to evaluate the remedy, and then an "additional, indefinite amount of time"?in the court's words?to select the remedy. And if the remedy fails or is ineffective, it could take years to close the impoundment. This, the court ruled, fails the "no

reasonable probability of adverse effects" standard under RCRA.

- **Legacy Ponds**. The court also rejected EPA's approach to regulating so-called inactive "legacy ponds." These facilities are found at coal-fired power plants that are no longer in operation. For these ponds, the CCR rule required remediation only after leakage was discovered. Given the dangers presented by these isolated, unattended ash impoundments, the D.C. Circuit rejected that reactive approach as inconsistent with RCRA's "no reasonable probability of adverse effects" requirement.

Industry Petitioner Challenges

- **Inactive Impoundments**. Relatedly, the court rejected industry's argument that EPA lacked authority to set any standards at all for inactive impoundments. There, industry relied on the definition of "open dump" as "any facility or site where solid waste is disposed of… ." According to industry, the phrase "is disposed of" requires active disposal, which would exclude inactive impoundments. But the court disagreed, using a less than flattering analogy:

Think of it this way: If a kindergarten teacher tells her students that they must clean up any drink that 'is spilled' in the room, that would most logically be understood to mean that a student must clean up her spilled drink even if the spill is already completed and nothing more is leaking out of the carton. A student who refused to clean up that completed spill (as Industry Petitioners would have it) might well find himself in timeout.

Thus, according to the court, the phrase "is disposed of" under RCRA includes a disposal that occurred at some prior point in time. EPA has authority to regulate these ponds under RCRA, but, as noted above, chose too little regulation to pass muster under the landfill requirements.

- **Alternative Closure Exemption**. The court also rejected industry's challenge to the criteria for the "alternative closure" exemption, which allows a noncompliant CCR site to continue operating for another five years before it ceases operations. To qualify, the owner has to certify that there is no alternative disposal capacity available on or off-site; increased costs or inconvenience don't qualify. Industry complained, but the court found no mention of cost considerations in the relevant RCRA provision, and thus EPA was justified in not considering them?if not also statutorily precluded from do so?in crafting the exemption.

Significance of Ruling

The D.C. Circuit's rejection of significant portions of the CCR rule could have serious implications for electric utilities that are still heavy on coal. And, EPA will have trouble justifying any decision to require anything other than an impermeable liner for CCR impoundments. That is no small thing; there are about 735 active surface impoundments at power plants throughout the country, and most of them are unlined.

Compliance with the CCR rule was already expensive, influencing plant retirement decisions. Retrofitting impoundments under the D.C. Circuit's ruling will be even more so. Utility companies should think about whether and how the D.C. Circuit's ruling may influence their resource planning decisions and regulatory strategies. On the bright side, more coal-fired generation retirements may widen the window for renewable energy developers eager to replace that lost capacity with cheaper sources. That could mean more economic development and jobs, and a greener U.S. grid.

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