Updates
September 28, 2018
Courts to Environmental Plaintiffs: Use RCRA, not Clean Water Act, to Address Coal-Ash Disposal at Coal-Fired Power Plants

In three recent decisions, the U.S. Courts of Appeal for the Fourth Circuit and Sixth Circuit have signaled the courts' refusal to allow environmental plaintiffs to use the federal Clean Water Act to address coal ash pollution from unlined storage ponds at coal fired power plants. Instead, environmental plaintiffs should use the Resource Conservation and Recovery Act and U.S. EPA's Coal Combustion Residuals (CCR) rule, which were designed to deal with those issues.

However, the U.S. Court of Appeals for the D.C. Circuit vacated and remanded significant portions of the CCR rule on August 21, 2018, raising questions about the status of coal ash disposal regulation and EPA's next steps. This update discusses the recent judicial opinions and what they may mean for regulation of this significant environmental issue.

Background: CWA and RCRA

Enacted in 1972, the purpose of the CWA is to "restore and maintain …the Nation's waters" by, among things, requiring a permit from EPA or a state to "discharge… any pollutant" to waters covered by the CWA.

Definitions in the CWA are key to defining the law's jurisdictional reach. For example, "discharge of a pollutant" means the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). Navigable waters are defined broadly as "the waters of the United States" and "point source" includes "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure…" 33 U.S.C. 1362(7) and (14).

RCRA, by contrast, regulates solid and hazardous waste storage and disposal, including storage of coal ash solid waste in landfills and settling ponds through EPA's CCR rule. Importantly, the CWA and RCRA do not overlap. In simplest terms, RCRA regulates the waste while it is stored in a pond or landfill, and the CWA regulates the discharge from the pond to navigable waters.

Fourth Circuit Applies "Conduit" Theory of CWA Liability, But Still Requires "Point Source" Discharge

On September 12, 2018, the Fourth Circuit held in *Sierra Club v. Virginia Electric & Power Company (VEPCO)* that the CWA did not prohibit discharge of arsenic from ash ponds at a retired coal-fired power plant owned by Dominion Energy, where those discharges first travel through groundwater before reaching a nearby river.

The Fourth Circuit agreed that pollutant discharges to groundwater directly connected to surface water can violate the CWA (known as the "conduit" theory), relying on its opinion earlier this year in *Upstate Forever v. Kinder Morgan Energy Partners.*

But that wasn't the end of the story. Even if the pollutants come from hydrologically connected groundwater, the CWA only applies where the discharge is from a "point source." The court rejected Sierra Club's argument that the settling ponds and ash landfills were "point sources", reasoning that the seepage of arsenic through soil via rainwater was too diffuse to meet that definition. Moreover, the court said, the CWA was "intended to target the *measurable* discharge of pollutants", an "impossible" task with a diffuse discharge through soil to groundwater. Rather than rely on the CWA, the court noted that the Sierra Club should use RCRA to pursue its claims relating to the storage and disposal of coal ash waste.

Sixth Circuit Rejects "Conduit" Theory

In a pair of decisions issued on September 24, 2018, the Sixth Circuit departed from the Fourth Circuit in *VEPCO* and *Upstate Forever* and rejected the "conduit" theory in *Kentucky Waterways Alliance v. Kentucky Utilities Company* and *Tennessee Clean Water Network v. Tennessee Valley Authority*.

Based on facts similar to *VEPCO*, the court held that the pollutant discharges in those two cases were not "into" the nearby navigable waters. Instead, the discharges were first to groundwater, which the CWA does not regulate, and then to surface water. In *Kentucky Waterways Alliance*, the court also declined to accept the environmental groups' argument, similar to the one made in *VEPCO*, that groundwater was itself a point source.

The environmental plaintiffs' reliance on Justice Antonin Scalia's plurality opinion in *Rapanos v. United States* also offered no support for the "conduit" theory, the court said. There, Justice Scalia acknowledged that the CWA regulates even those pollutant discharges not *directly* discharged to navigable waters, as from one channel or pipe to another until reaching a waterbody. But that does not mean, the court reasoned, that the CWA still applies where nonpoint source seepage to groundwater breaks the chain of conveyances to navigable waters.

The court in *Kentucky Waterways Alliance* also expressed concern that using the CWA to regulate coal ash pollution of groundwater would "gut" RCRA and the CCR rule, which were intended to address those problems. The good news for the plaintiffs in that case is that they brought RCRA claims, too, which the court allowed to proceed after finding that the jurisdictional prerequisites to filing suit under that law had been met.

Conclusion

Courts of appeal are reluctant to read the CWA as regulating coal ash pollution when RCRA and CCR rule are intended to address those very concerns. But the CCR rule is in flux after the D.C. Circuit's vacatur and remand, casting a cloud of uncertainty over the hundreds of remaining coal ash ponds and landfills around the country.

In the meantime, environmental plaintiffs will likely continue to develop creative theories to press for faster cleanup of the unlined ponds. Utilities and regulators alike should account for this uncertainty as they craft environmental compliance and resource development strategies.

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