Updates
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Legal Landscape for Coal Ash Ponds Remains in Flux

Federal environmental law governing coal ash ponds used by many regulated electric utilities remains uncertain after a flurry of recent activity at the Environmental Protection Agency and in the courts. This update addresses the recent controversies surrounding the EPA's regulation of coal ash ponds, disagreements among the federal district and appellate courts on which environmental laws apply, and how coal ash pond owners can best insulate themselves from this uncertainty and the associated increased regulatory costs.

EPA Rules Regulating CCRs Under the Resource Conservation and Recovery Act

On the regulatory front, the EPA issued final rules in April 2015 regulating coal combustion residuals (CCR) under Subpart D of the Resource Conservation and Recovery Act. Put simply, RCRA Subpart D prohibits "open dumps," which RCRA defines as sites where solid waste is disposed of in a way that does not ensure "no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility."[1] In August 2018, the U.S. Court of Appeals for the District of Columbia Circuit vacated much of the EPA rule, finding that it failed to meet the RCRA standard of "no reasonable probability of adverse effects."

Prior to the court's ruling, on July 30, 2018, the EPA issued a revised final rule concerning CCR which would, among other things: (1) allow states with approved CCR programs to use alternate performance standards; (2) revise the groundwater protection standards for four constituents that do not have an established Maximum Contaminant Level under the Safe Drinking Water Act; and (3) provide facilities that would be triggered into closure by the regulations with additional time to cease receiving waste and initiate closure.[2] In October 2018, environmental groups filed a petition for review in the D.C. Circuit,[3] claiming the new rule is designed to gut the EPA's 2015 coal ash disposal regulations that the D.C. Circuit found did not go far enough toward meeting the RCRA standard of "no reasonable probability of adverse effects."

Rather than fight the lawsuit, EPA requested a voluntary remand so that the agency could reconsider its new CCR rule in conjunction with its reconsideration of the prior 2015 rule. On March 13, 2019, the D.C. Circuit granted EPA's request.

Environmental Groups' Report on Leaking Coal Ash Ponds

On March 4, 2019, the Environmental Integrity Project and Earthjustice jointly published their analysis of groundwater monitoring data posted on power companies' websites in 2018 pursuant to the CCR rule requiring that such data be reported and posted. This environmental group report received widespread publicity for its conclusion that the vast majority of the ponds and landfills were leaking unsafe levels of contaminants into the groundwater. According to the report, the contamination at a site typically involves multiple chemicals, and the majority of coal plants had unsafe levels of at least four toxic coal ash constituents in the groundwater.

This report follows other widely reported concerns raised last year regarding flooding at coal ash sites in the wake of Hurricane Florence. Given the published groundwater monitoring data and the publicity surrounding the vulnerability of some coal ash ponds and landfills to weather-related events, coal power plant owners clearly face renewed risks of lawsuits seeking to recover damages for exposure to coal ash constituents.

Status of Contractor Remediation Litigation Against the Tennessee Valley Authority

The risk to coal power plant owners is illustrated by a recent Tennessee federal court decision involving injuries and illnesses suffered by remediation workers who participated in the cleanup of a 2008 coal ash spill at the Tennessee Valley Authority's Kingston power plant. Last November, a jury in the U.S. District Court for the Eastern District of Tennessee ruled that exposure to toxins from a coal ash spill could have caused the health problems suffered by workers employed in the cleanup. The jury concluded that the remediation workers' ailments—which ranged from cancers to blood, heart, lung, neurological and skin diseases to chronic breathing sicknesses—were caused by some of the constituents of coal ash.[4] As a result of this verdict, the presiding judge recently ordered the parties into mediation, which could result in settlements requiring the payment of damages and for medical monitoring and treatment.[5]

Circuit Court Split and Supreme Court Review of Applicability of the Clean Water Act

In a development highly relevant to coal ash pond regulation, the U.S. Supreme Court agreed last month to take up the question of whether the Clean Water Act regulates the discharge of pollutants to groundwater hydrologically connected to surface water—a question arising from a split in the circuit courts of appeal.

The U.S. Court of Appeals for the Fourth Circuit recently found that an on-site landfill and settling ponds used by an electric utility to store coal ash do not constitute "point sources" as defined in the CWA.[6] As we previously reported, the Fourth Circuit clarified that Section 1311(a) of the CWA prohibits discharge of a pollutant into navigable waters, that "discharge of a pollutant" is limited to the addition of any pollutant to navigable waters from any point source, and that the addition of pollutants from *nonpoint sources* does not violate Section 1311(a). The Fourth Circuit further clarified that it had previously held the addition of a pollutant into navigable waters via groundwater can violate Section 1311(a) on a showing of a direct hydrological connection between the groundwater and the navigable waters.[7]

However, in the *Sierra Club* case, the pollutant had been leached from the coal ash by rainwater and groundwater and was ultimately carried by groundwater into navigable waters. The Fourth Circuit determined that such a simple causal link did not constitute a discharge from a point source as required by the CWA. The court then distinguished between two forms of discharges that are separately regulated by Congress: (1) diffuse discharges from solid waste regulated under RCRA; and (2) discharges from a point source regulated under the CWA. According to the Fourth Circuit, absent the source of the discharge functioning as a conveyance of the pollutant into navigable waters, the discharge is not from a point source and does not violate the CWA.

As described in our previous update on these matters, in two cases in 2018, the U.S. Court of Appeals for the Sixth Circuit applied a stricter test for CWA liability than the Fourth Circuit.[8] Specifically, the Sixth Circuit rejected the "conduit theory," which posits that the CWA regulates a discharge from a point source, that passes through groundwater as a conduit, to navigable waters. In these two cases, the Sixth Circuit held that the pollutant discharges 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. The Sixth Circuit expressed concern that using the CWA to regulate coal ash pollution of groundwater would "gut" RCRA and the CCR rule, which are intended to address those problems. The RCRA claims brought by the plaintiffs in these two cases were allowed to proceed.

These Fourth and Sixth Circuit decisions contrast with a recent Ninth Circuit decision on the reach of the CWA.[9] In *County of Maui*, pollutants discharged without a permit from county wastewater injection wells reached the Pacific Ocean through groundwater. The Ninth Circuit found that each well was a point source and interpreted the CWA to encompass the indirect discharge from a point source that is fairly traceable to a navigable water. The Supreme Court agreed to review this case last month.

What Does This Mean for Utilities?

First, the Supreme Court's review of *County of Maui* should provide some clarity to utilities and owners of coal ash ponds and landfills regarding the reach of the CWA and the scope of their exposure for seepages into groundwater that reaches navigable waters.

Second, given that the CCR rule remains in flux, utilities should incorporate eventual changes into their near-term environmental compliance, resource planning and regulatory strategies before utility commissions.

Third, given the increased litigation exposure with heightened attention on coal ash ponds, utilities facing potential liability or cleanup costs from alleged coal ash contamination should review their insurance coverages to determine whether any of their policies may respond to the loss. Many liability policies contain "time element" pollution coverage, which responds to abrupt discharge events such as ruptures or overflows that occur and are reported during the policy period. In addition, at older sites, lawsuits or government cleanup actions alleging long-term pollution damage may trigger coverage under historic liability policies that were purchased by the utility or its predecessor before "pollution exclusions" became common in basic coverage. In either case, a utility should identify and promptly notify potentially responsible insurers. Indeed, "time element" pollution coverage in current policies typically has short deadlines for providing notice, and prompt notice will help the policyholder avoid insurer arguments against coverage for the early steps the policyholder takes to address the situation before the insurer becomes involved.

Coal ash pond owners should be proactive in this fast-moving regulatory environment. Tracking legal developments in the courts, engaging in sound environmental and regulatory planning, and careful review of insurance coverages will help protect coal ash pond owners and utility customers alike from the uncertainty and increased costs associated with coal ash pond regulation.

ENDNOTES

[1] 42 U.S.C. §§ 6944(a), 6903(14), (26).

[2] *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One)*, 83 Fed. Reg. 36,435 (July 30, 2018).

[3] *Waterkeeper Alliance, Inc., et al. v. EPA*, No. 18-1289 (D.C. Cir. Oct. 22, 2018).

[4] *See* Jury Verdict, *Adkisson v. Jacobs Eng'g Grp., Inc.*, No.: 3:13-CV-505-TAV-HBG (E.D. Tenn. Nov. 7, 2018), ECF No. 408.

[5] *See* Order Granting Motion to Stay, *Adkisson v. Jacobs Engineering Group, Inc.*, No: 3:13-CV-505-TAV-HBG (E.D. Tenn. Jan. 18, 2019), ECF No. 459.

[6] *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403 (4th Cir. 2018).

[7] *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018).

[8] *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018), *reh'g denied*, 913 F.3d 592 (6th Cir. 2019).

[9] *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).

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