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Coal Ash Rule Update: Will Citizen Groups Be Able to Use RCRA to Second-Guess Utilities' Closure Plans?

By Anthony G. Hopp*

The recent surge in Resource Conservation and Recovery Act private citizen suits poses a concern for utilities who are diligently working through coal ash pond closure in compliance with complex and sometimes conflicting state and federal regulations. The author of this article discusses the Act, the coal ash rule, and recent case law on the issue.

According to recent reports, the number of citizen suits filed under the Resource Conservation and Recovery Act ("RCRA") has risen sharply in the past three years. Commentators have suggested that the recent surge in private RCRA enforcement litigation is in response to a perceived lack of enforcement activity by U.S. Environmental Protection Agency ("EPA"). Many of these cases have been filed by non-profit public interest organizations that have been established for the specific purpose of protecting some environmental resource. These organizations have purportedly seen huge increases in private donations in recent years and perceive these donations as a mandate to pursue sometimes novel theories of liability in RCRA citizen suits.

At the same time, hundreds of coal ash surface impoundments are, or soon will be, in the process of closure under the federal Coal Ash Rule or similar state-led programs. Citizen groups will no doubt scrutinize utilities' closure plans and may seek injunctive relief under RCRA if they believe that the plans do not meet federal regulatory closure requirements or otherwise sufficiently protect the environment. While only a small handful of RCRA citizen suits challenging the closure of coal ash impoundments have been reported, those decisions provide important clues as to under what circumstances courts will be willing to step in and supervise the closure of a coal ash impoundment.

THE COAL ASH RULE AND IMPOUNDMENT CLOSURE

On April 17, 2015, the EPA published its rule on the Disposal of Coal Combustion Residuals from Electric Utilities (the "Rule"). The Rule was designed to "regulate the disposal of coal combustion residuals . . . as solid waste under subtitle D" of RCRA. The Rule establishes "national minimum criteria for existing and new CCR landfills . . . and surface impoundments . . . consisting of location restrictions, design and operating criteria, ground-

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water monitoring and corrective action, closure requirements and post-closure care, and recordkeeping, notification and internet posting requirements."[1] The Rule is designed to be "self-implementing," meaning that "facilities are directly responsible for ensuring that their operations comply with the Rule's requirements."[2] EPA's 2015 Federal Register Notice specifically envisioned that the primary enforcement mechanism for the Rule would be citizen suits under Section 7002 of RCRA.[3]

A year after the Rule was promulgated by EPA, Congress passed the Water Infrastructure Improvements for the Nation Act ("WIIN Act"). The 2016 WIIN Act allows states to obtain approval from EPA to administer coal ash permitting programs "in lieu of" the federal rule, and to assume enforcement responsibilities.[4] So far, only Oklahoma has received approval for a coal ash permitting program under the WIIN Act. Georgia's application for WIIN Act approval remains pending. Other states, such as North Carolina, Michigan, and Illinois, have elected not to seek WIIN Act approval and instead have imposed their own clean-up standards for coal ash impoundments.

Under the Rule, impoundments which do not meet certain criteria, such as location, liner composition, and groundwater impacts, must begin the process of retrofitting or closure.[5] EPA's current deadline for non-compliant facilities to begin closure activities is October 31, 2020.[6] It has been estimated that more than 200 impoundments fail the rule's groundwater or other criteria and will eventually be required to close. Some utilities have elected to close their impoundments by removing all of the coal ash and either reusing it or disposing of it elsewhere. Others have elected to cap their impoundments in place and to address groundwater contamination through various methods, including natural attenuation. The Rule requires owners and operators of coal ash impoundments to post their written closure plans and related documentation to publicly-available websites.[7] Environmental advocacy groups review these plans and re-post them on websites such as Ashtracker.com.

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[1] 80 Fed. Reg. 21,302.

[2] *Id.* at 21,311.

[3] *Id.* at 21,427; 42 U.S.C. § 6972.

[4] 42 U.S.C. § 6945(d)(1)(A).

[5] 40 C.F.R. § 251.101.

[6] 83 Fed. Reg. 36441.

[7] 40 C.F.R. 102(b); 107(a).

RCRA CITIZEN SUIT PROVISIONS

RCRA subtitle D allows for sanitary landfills, but prohibits "open dumps." A facility is an open dump under RCRA if it poses a "reasonable probability of adverse effects on health or the environment."[8] RCRA authorizes citizen suits under a number of circumstances, including that the owner or operator "is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to" RCRA or that the facility "present[s] an imminent and substantial endangerment to health and the environment."[9]

A citizen group seeking to challenge a utility's closure plan or closure activities, therefore, has several potential avenues for legal action. It could claim that the facility is an "open dump" and therefore prohibited under subtitle D; it could allege that the closure plan does not meet all of the sometimes conflicting requirements of the Coal Ash Rule and is consequently in "violation" of a "standard, regulation, condition, requirement, prohibition or order . . . ," or; it could assert that the facility poses an "imminent and substantial endangerment to health or the environment." A court considering a RCRA citizen suit has the authority to issue injunctive relief to enforce the "standard, requirement or regulation" at issue or to order the defendant "to take any such other action as may be necessary . . . ." The court may also impose civil penalties and award attorneys' fees in appropriate circumstances.[10]

A utility facing a citizen suit over a closure plan or closure activities is at risk of having a court use injunctive relief to step in and take an active supervisory role over its operations. Understandably, utilities are concerned that courts are not well-suited to this task, particularly in situations where a state agency is already reviewing or has already approved a closure plan. Utilities are also understandably concerned that citizen groups may seek injunctive relief under RCRA, which would impose clean-up standards that are more onerous than the Rule or state law requires.

DEFENSES TO CLOSURE-RELATED CITIZEN SUITS

Utilities' objections to RCRA citizen suits related to impoundment closure often arise from the central concern that closure is already a highly-regulated process. In some instances, utilities have negotiated closure plans with the relevant state agency and are implementing those plans. In other cases, utilities are making good-faith efforts to follow the detailed closure provisions of the

[8] 42 U.S.C. § 6944.

[9] 42 U.S.C. § 6972.

[10] 42 U.S.C. § 6972.

self-implementing the Rule. Utilities argue that it is inappropriate and counterproductive for citizen groups and courts to "second guess" the utilities' efforts to achieve a closure that complies with an approved closure plan or the applicable regulations. The few courts which have ruled on utilities' objections to RCRA citizen suits in this context have reached conflicting results.

Roanoke River Basin Association v. Duke Energy Progress LLC

The Roanoke River Basin Association (the "Association") filed a RCRA citizen suit against Duke contending that Duke's closure plan for its surface impoundment at its Mayo Steam Electric Plant "fail[ed] to meet the minimum requirements for closure plans" under the Rule and that the impoundment in question was an "open dump." The complaint did not allege that the impoundment posed an "imminent and substantial" endangerment, but did seek "preliminary and permanent injunctive relief to ensure that Duke Energy files a Closure Plan" that "satisfies the requirements" of the Rule. The Association's concerns appeared to be more focused on the content of Duke's closure plan than on any alleged, ongoing environmental harm from the operation or closure of the impoundment. In other words, Duke's alleged non-compliance caused the Association an "informational injury" because Duke's plan allegedly did not contain all of the information to which the Association claimed the public is entitled. Duke moved to dismiss on several grounds.

First, Duke claimed that the Association lacked standing. In order to have standing under Article III of the Constitution, the plaintiff must allege an invasion of a legally-protected interest, which is concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical. There also must be a causal correction between the alleged injury and the conduct complained of. The Association was made up of individuals and organizations dedicated to the preservation and enhancement of the Roanoke River. They claimed to own property, to fish and to enjoy other recreational activities in the vicinity of and downstream of Duke's Mayo plant.

Duke argued, and the court held, that the injury the Association complained of—a lack of information on Duke's closure plan—was not causally linked to the plaintiff's use and enjoyment of the river. The court held that the Association lacked standing because it had not alleged a concrete and particularized injury which was closely related to Duke's alleged conduct.

Next, Duke claimed that the Association's claim was not "ripe." The court noted that ripeness "is essentially an issue of timing." The court stated that it should dismiss a case as unripe if the plaintiff has not yet suffered any injury and any future impact "remains wholly speculative," or if the claim "rests upon contingent future events that may not occur as anticipated, or indeed may not

occur at all." The court held that the Association's claims were not ripe because Duke's closure plan was preliminary, and likely to be revised and amended.

In the *Roanoke River Basin* case, therefore, the court recognized that not all "paperwork" violations gave rise to RCRA claims. The court also showed reluctance to involve itself in supervising Duke's closure plan while that plan remained "preliminary."

Kentucky Waterways Alliance v. Kentucky Utilities

The *Kentucky Waterways* case ultimately reached the opposite conclusion. In *Kentucky Waterways,* Kentucky Utilities ("KU") had applied for and received a permit from the Kentucky Division of Waste Management ("KDKM") to close a decades-old ash pond by capping it in place. KDKM had also approved KU's groundwater Remedial Action Plan ("GWRAP") which, while conceding that the pond would continue to impact local groundwater even after closure, also stated that KU would continue to work with KDKM to reduce groundwater impacts.

The Alliance issued a pre-suit RCRA notice letter to KU and the Kentucky Department of Environmental Protection ("KDEP") claiming that the continued presence of coal ash in contact with groundwater, even after closure, posed an "imminent and substantial endangerment to human health and the environment," and that KU's GWRAP was not adequate to abate the endangerment. After receiving the letter, KDEP issued a notice of violation to KU related to groundwater impacts from the pond. KU and KDEP expeditiously negotiated and entered into an agreed consent order which required KU to submit a revised closure plan, and to conduct additional remedial activities designed to address "any threat or potential threat to human health or the environment" posed by the storage of coal ash in the pond.

Despite the agreed order and KU's additional remedial activities, the Alliance filed a RCRA citizen suit alleging that KU's remedial actions were inadequate, and seeking an injunction requiring KU to "eliminate the endangerment." The district court dismissed the Alliance's RCRA claims. The court noted that KDEP and KU had entered into the agreed order to address the very issues that were the subject of the lawsuit, and that the lawsuit "amounts to little more than an invitation to second-guess the state regulatory agency and to award relief on more stringent terms than it has imposed." The court went on to reason that allowing the RCRA claim to go forward would "fail to respect the statute's careful distribution of enforcement authority among the federal EPA, the states and private citizens, all of which permit citizens to act where EPA has failed to do so, but not where EPA has acted, but not acted aggressively enough in the citizen's view." Ultimately, the district court held that the plaintiffs lacked

standing to seek injunctive relief because the consent order between KU and KDEP was already addressing the injuries alleged in the complaint.

On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed. While the Sixth Circuit was respectful of the district court's reluctance to intervene in a situation that was already being capably managed by state regulatory authorities, it held that a properly-plead RCRA citizen suit is barred only if the state or EPA has filed and is "diligently prosecuting a civil or criminal action" against the defendant to require compliance with the permit or regulation at issue.[11] The agreed order between KU and KDEP did not qualify as "diligent prosecution" of the alleged violation.

The Sixth Circuit also held that it would be improper for a court to abstain under the U.S. Supreme Court's *Burford* abstention doctrine. *Burford* instructs federal courts to abstain in cases where the relief sought would interfere with the state's regulatory function. According to the Sixth Circuit in *Kentucky Waterways,* RCRA explicitly sets forth the circumstances under which a federal court is prohibited from acting (*i.e.,* diligent prosecution of the defendant) and therefore the application of the *Burford* abstention doctrine would amount to an impermissible expansion of the "actions prohibited" under RCRA.

CONCLUSION

The recent surge in RCRA private citizen suits poses a concern for utilities who are diligently working through coal ash pond closure in compliance with complex and sometimes conflicting state and federal regulations. Citizen groups seeking injunctive relief under RCRA are not bound by the Rule or other applicable regulations and may be emboldened to seek remedies which are technically unfeasible or prohibitively expensive. The district court opinions in *Roanoke River Basin* and *Kentucky Waterways Alliance* highlight strategies to avoid such "second-guessing." The Sixth Circuit opinion in *Kentucky Waterways,* however, demonstrates that not all courts are prepared to defer to the regulatory process.

[11] 42 U.S.C. § 6972(b).