The Fate of the CCR Rule "is" Still in Dispute

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In May of last year, *Environmental Notes* reported on the many petitions that had been filed challenging EPA's 2015 promulgation of a final waste management rule addressing the management and disposal of coal combustion residuals ("CCR Rule"). As is often the case with challenges to environmental regulations, the litigation has been slow, and the outcome remains uncertain.

The CCR Rule requires companies with existing surface impoundments to perform inspections and integrity studies, monitor groundwater, take corrective action where hazardous constituents have leached to groundwater above groundwater protection standards, upgrade (to include a liner and location restrictions) or close, and perform recordkeeping. Environmental groups attacked the regulation as not being sufficiently protective. Industry groups challenged the regulation on the basis that EPA does not have authority under the federal Resource Recovery and Conservation Act (RCRA) to regulate coal ash disposed of long ago in surface impoundments that have been dormant for decades.

Since the petitions were filed in 2015, a new President has been elected and EPA has new leadership. Not surprisingly, in September of this year, EPA informed the public and the United States Court of Appeals for the D.C. Circuit that it was granting industry groups' request to review certain provisions of the CCR Rule, including those under appeal. EPA and the industry groups asked the Court to delay further action on the case during the agency's review. The D.C. Circuit declined, and thus, after two years in the court system, oral arguments were held last November on the CCR Rule.

The main issues addressed by the panel of judges that heard the appeal were:

1. Does EPA have authority to regulate inactive surface impoundments?
2. If so, and if some or all of the rule is found to be legally deficient, should the Court remand the rule to EPA without invalidating the offending provisions, referred to as "remand without vacatur," so that they remain intact until such time as EPA considers what to do with the rule in a new rulemaking?

On the issue of EPA's authority, the Court was not easy on EPA or industry group representatives. When industry group lawyers pointed to RCRA's directive to EPA to regulate where waste *'is* disposed of," and not where waste "*was* disposed of," the panel seemed unimpressed. In fact, one judge questioned attorneys for industry on why a waste that now sits in a surface impoundment isn't, in the present tense, currently or presently "disposed of."

Regarding remand, environmental groups argued remand was totally inappropriate as to any provisions.

The Court implied in comments during arguments that both sides could benefit from remand since both sides enjoy the *status quo* on the provisions they support. However, the panel commented that it was not convinced remand without vacatur was necessary since EPA can revisit a rule anytime it wants, with or without permission from the Court. That would, of course, mean an entirely new rulemaking and the risk (if not certainty) of more legal challenges.

And so industry "was," and still "is," waiting for an answer as to what it needs to do with the millions of tons of coal ash sitting in dormant impoundments. Based on the tone of arguments in the courtroom, it does not seem likely the Court is convinced EPA does not have jurisdiction to regulate dormant coal ash surface impoundments. The real question, however, is will EPA change course given the changes in Washington since the CCR Rule was first promulgated.

Utility Solid Waste Activities Group, v. EPA, No. 15-1219 (D.C. Cir.); 80 Fed. Reg. 21302 (April 17, 2015)

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