



The Coal Ash Rule Trilogy Spanning Obama, Trump, and the D.C. Circuit

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For many decades, Americans relied on coal to power the country. In the most recent decade, the Environmental Protection Agency has been attempting to regulate the waste that results from burning that coal. In 2015, the Obama administration revealed the first federal regulations for coal combustion residuals (CCR or coal ash). In 2018, the Trump administration finalized its first round of amendments to this rule. In *Util. Solid Waste Activities Grp. v. EPA ("USWAG")*, the D.C. Circuit sent portions of the 2015 regulations back to the agency for revision.¹ In turn, the D.C. Circuit sent back the 2018 amendments by the Trump administration for revision consistent with the *USWAG* decision.² In December 2019, the Trump administration released a proposed rule responsive to the changes required by the court.

This article reviews three rules—the 2015 Rule,³ the 2018 Amendments,⁴ and the 2019 Proposed Rule⁵—specifically comparing each rule's (1) coal ash impoundment closure initiation deadlines, (2) alternative closure extensions, and (3) consideration of cost. Comparing these three elements reveals the administrations' differing regulatory priorities, and also investigates the impact of the court's decision.

I. Background

Coal-fired generation presents many pollution challenges. Of particular concern are coal combustion residuals or "coal ash." Coal ash comprises "one of the largest industrial waste streams generated in the U.S."⁶ Coal ash contains particularly dangerous toxins, including arsenic, lead, and mercury.⁷ Coal-fired generation operators either store coal ash in wet (surface impoundments) or dry (landfills) disposal systems, which can either be unlined, clay-lined, or

¹ *Util. Solid Waste Activities Grp. v. EPA (USWAG)*, 901 F.3d 414 (D.C. Cir. 2018).

² *Waterkeeper All., Inc. v. EPA*, No. 18-1289, 2019 U.S. App. LEXIS 7443 (D.C. Cir. Mar. 13, 2019).

³ Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,301 (Apr. 17, 2015) (to be codified at 40 C.F.R. pts. 257 & 261).

⁴ Amendments to the National Minimum Criteria, 83 Fed. Reg. 36,435 (Jul. 30, 2018) (to be codified at 40 C.F.R. pt. 257).

⁵ A Holistic Approach to Closure Part A: Deadline To Initiate Closure, 84 Fed. Reg. 65,941 (proposed Dec. 2, 2019) (to be codified at 40 C.F.R. pt. 257).

⁶ 80 Fed. Reg. 21,301, 21,303.

⁷ *Id.* at 21,311.



composite-lined.⁸ Improper management negatively affects human health and the environment.⁹ Leakage through unlined or inadequately lined coal ash impoundments contaminates groundwater and affects drinking water supplies.¹⁰ Given that 336 coal plants remain in operation,¹¹ coal ash contamination remains a top environmental concern.

The Resource Conservation and Recovery Act, enacted in 1976, authorizes EPA to regulate a wide variety of solid and hazardous wastes, including coal ash. Although the statutory authority to regulate has existed for four decades, federal regulation of coal ash is relatively new to the books. In 2008, the failure of a coal ash impoundment at the Tennessee Valley Authority Kingston Fossil Plant in Harriman, Tennessee catalyzed federal regulation.¹² The spill released over one billion gallons of coal ash slurry (a liquid mixture of coal ash and water) and affected over 300 acres, including residential properties.¹³

In 2015, the Obama administration finalized the first federal regulation of coal ash ("2015 Rule") under Subtitle D of the Resource Conservation and Recovery Act (RCRA).¹⁴ Deferring the decision of whether to regulate coal ash as "hazardous waste" under the more stringent Subtitle C, EPA opted to regulate coal ash as "nonhazardous waste" under Subtitle D.¹⁵ Subtitle D requires EPA to promulgate criteria for waste facilities, ensuring "no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility."¹⁶ The 2015 Rule required leaking, unlined coal ash impoundments to initiate closure and stop receiving waste.¹⁷ The rule allowed unlined coal ash impoundments without leaks to continue operating. Environmentalists and industry both challenged the final rule.¹⁸

In July 2018, the Trump EPA finalized its first set of amendments to the 2015 Rule ("2018 Amendments").¹⁹ These amendments were short lived. Less than one month later, the D.C. Circuit ruled on the challenges to the 2015 Rule in the *USWAG* case. The court decided the 2015 Rule did not adequately protect human health and the environment, as required by the statute, because the rule allowed the continued operation of unlined impoundments.²⁰ EPA itself had found that all unlined impoundments, regardless of leaks, presented the "greatest risks to

⁸ *Id.*

⁹ *Id.* at 21,319.

¹⁰ *Id.* at 21,328.

¹¹ U.S. Energy Info. Admin., Form EIA-860 (Sep. 3, 2019), <https://www.eia.gov/electricity/data/eia860/>.

¹² 80 Fed. Reg. at 21,313

¹³ *Id.*

¹⁴ *Id.* at 21,302.

¹⁵ *Id.* at 21,303.

¹⁶ 42 U.S.C. § 6944(a).

¹⁷ 40 C.F.R. § 257.101(a)(1) (2016).

¹⁸ *USWAG*, 901 F.3d 414, 420 (D.C. Cir. 2018).

¹⁹ 83 Fed. Reg. 36,435.

²⁰ *USWAG* 901 F.3d at 430.



human health and the environment.”²¹ The court sent the 2015 Rule back to EPA, ordering it to make changes in line with the defects the court found in the rule.²²

In March 2019, the D.C. Circuit ruled in the *Waterkeeper* case on the 2018 Amendments, which rolled back regulatory oversight and extended deadlines. The court sent the 2018 Amendments back to EPA for revision consistent with the *USWAG* decision.²³ In short, the court tasked a notoriously deregulatory administration with drafting a coal ash rule stronger than the one promulgated by the Obama EPA.

On December 2, 2019, the Trump Administration published its second attempt to amend the 2015 Rule, this time constrained by court instruction (“2019 Proposed Rule”).²⁴ The question remains as to whether this proposed rule adheres to the *USWAG* court order.

II. Closure Initiation Deadlines

Sixty-five percent of existing coal ash impoundments are unlined, creating significant health concerns for nearby residents.²⁵ In its 2014 Regulatory Impact Analysis, EPA estimated the risk of groundwater contamination within a one-mile radius for an unlined impoundment to be 37.2%.²⁶ All three versions of the coal ash rule have attempted to address this health problem by establishing a deadline for unlined coal ash impoundments to initiate closure and stop receiving waste.

The 2015 Rule took a reactive, rather than a proactive, approach to this issue. Under the 2015 Rule, an owner or operator had a six-month window to initiate closing after the operator detected a leak.²⁷ If an unlined impoundment was not yet leaking, it could continue to operate.²⁸ EPA did not require groundwater monitoring systems to be fully installed and evaluating sampling data at unlined impoundments until 30 months (2.5 years) after the final 2015 Rule was published.²⁹

Impoundments lined with compacted soil, otherwise known as “clay-lined” impoundments, likewise present serious risk of leaking and contamination problems.³⁰ Clay-lined impoundments

²¹ *Id.* at 427 (quoting 80 Fed. Reg. at 21,451).

²² *USWAG* 901 F.3d at 449–50.

²³ *Waterkeeper All., Inc. v. EPA*, No. 18-1289, 2019 U.S. App. LEXIS 7443, at *2 (D.C. Cir. Mar. 13, 2019).

²⁴ 84 Fed. Reg. 65,941.

²⁵ U.S. EPA, REGULATORY IMPACT ANALYSIS: EPA’s 2015 RCRA FINAL RULE REGULATING COAL COMBUSTION RESIDUAL (CCR) LANDFILLS AND SURFACE IMPOUNDMENTS AT COAL-FIRED ELECTRIC UTILITY POWER PLANTS 3–4 (December 2014) (EPA-HQ-RCRA-2009-0640-12034).

²⁶ *Id.* at 5-22.

²⁷ 40 C.F.R. § 257.101(a)(1) (2016).

²⁸ *Id.*

²⁹ *Id.* at § 257.90(b).

³⁰ *USWAG* 901 F.3d at 431.



have a 9.1% chance of contaminating drinking water within a one-mile radius from the impoundment.³¹ Despite this threat, the 2015 Rule treated clay-lined impoundments the same as lined, allowing them to continue operating even after they were found to be leaking.³²

The 2018 Amendments extended the closure initiation deadline. Under the 2018 Amendments, an unlined, leaking impoundment was required to initiate a closure process and stop receiving waste within six months of leak detection, or October 31, 2020, whichever was later.³³

The 2019 Proposed Rule is the Trump administration's response to the *USWAG* and *Waterkeeper* court decisions. The *USWAG* decision faulted the EPA for allowing unlined impoundments to operate because they were unsafe, regardless of leaks.³⁴ In response, the 2019 proposed rule requires unlined impoundments to close "as soon as technically feasible," whether they are leaking or not.³⁵ The EPA reasons that "as soon as technically feasible" is August 31, 2020, which the Agency derives from the average time to acquire additional capacity to replace unlined impoundments.³⁶ This deadline also applies to clay-lined impoundments, in accordance with the *USWAG* decision. Clay-lined impoundments are now treated the same as unlined impoundments and likewise required to close by August 31, 2020.³⁷

III. Alternative Closure Extensions

Each of the three coal ash rules allows facilities to request extensions of the closure initiation deadline, known as "alternative closures." In every version, no extension can be granted unless an owner or operator demonstrates a lack of alternative capacity for its waste, showing a lack of space to build a new landfill or impoundment that meets the new standards.³⁸ However, with a few tweaked words, the rules differ about what determines a lack of capacity.

Under the 2015 Rule, there are two types of extensions. First, any owner or operator that demonstrates a lack of capacity may receive an additional five years to continue placing coal ash waste in the existing impoundment.³⁹ Second, if an owner or operator demonstrates a lack of capacity *and* the coal plant is scheduled to completely shut down within the coming decade, the closure deadline further extends to 2023 or 2028, depending on the coal ash impoundment's size.⁴⁰ Under the 2015 Rule, both of these extensions consider a facility's existing capacity for

³¹ *Id.*

³² 40 C.F.R. § 257.71(a)(3) (2016).

³³ 83 Fed. Reg. at 36,443.

³⁴ *USWAG* 901 F.3d at 427.

³⁵ 84 Fed. Reg. at 65,944.

³⁶ *Id.* at 65,946.

³⁷ *Id.* at 65,944.

³⁸ See e.g., 40 C.F.R. § 257.103(a)(1)(i) (2016); see also, 84 Fed. Reg. at 65,953–53.

³⁹ 40 C.F.R. § 257.103(a)(1)(i) (2016).

⁴⁰ *Id.* at § 257.103(b).



coal ash waste, and the extensions allow the continued placement of coal ash only. If other wastes were being discarded in the impoundments, they are no longer allowed to be placed in the impoundments during the extensions, placing considerable pressure on the owner or operator to secure additional waste capacity.

Generally speaking, the 2018 Amendments left these extensions in place. The issue of whether these extensions violated RCRA was not raised before the court in *USWAG*, leaving the extensions as potential regulatory loopholes. The 2019 Proposed Rule capitalizes on these extensions, expanding their potential for use as loopholes through two key changes.

First, the 2019 Proposed Rule adds a new, short-term extension.⁴¹ This three-month extension is "self-implementing."⁴² In its preamble to the proposed rule, EPA explains that it will not divert its resources towards processing applications and granting them for this short-term extension.⁴³ Practically speaking, because this short-term extension is automatically available to all facilities, it delays the deadline to initiate closure of unlined coal ash impoundments until November 30, 2020 rather than August 31, 2020.

Second, the 2019 Proposed Rule duplicates the 2015 Rule's alternative closures provisions, but with a critical distinction.⁴⁴ The new alternative closures consider a facility's capacity for coal ash *and* non-coal ash waste combined.⁴⁵ By considering all kinds of waste, more facilities can more easily demonstrate a lack of capacity and will likely qualify for the proposed rule's alternative extensions. These qualifying impoundments may continue to receive both coal ash and non-coal ash waste until the new deadline.⁴⁶ This proposed change reduces pressure on owners and operators of coal-generating facilities to find alternative solutions for their waste.

IV. The Role of Cost

For any alternative closure, an operator must demonstrate a lack of alternative capacity. Each of the rules states that "[a]n increase in costs or the inconvenience of existing capacity" is insufficient to demonstrate a lack of capacity.⁴⁷ Although each administration has incorporated the same language, EPA will likely more heavily consider cost in the proposed rule than it had in the 2015 rule.

The Obama EPA interpreted the quoted language as prohibiting any consideration of cost.⁴⁸ Industry challenged this approach in court as "arbitrary and capricious," claiming that some

⁴¹ 84 Fed. Reg. at 65,953.

⁴² *Id.*

⁴³ *Id.* at 65,953–54.

⁴⁴ *Id.* at 65,954.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 40 C.F.R. § 257.103(a)(1)(i) (2019).

⁴⁸ 80 Fed. Reg. at 21,432.



degree of cost must be considered; otherwise the alternative closure provision is inconsequential.⁴⁹ The court disagreed and concluded that, absent clear instructions from Congress to consider costs, EPA was welcome to ignore cost when determining the lack of alternative capacity.⁵⁰ The court noted that if EPA were to consider cost, this "would appear to violate RCRA's statutory mandate."⁵¹

The preamble to the 2019 Proposed Rule suggests the Trump EPA is opening the door to considering cost. Although the text of the rule remains the same in that section, EPA states that a facility's reasoning cannot "rely *solely* on cost considerations."⁵² EPA reiterates that "[i]f the owner or operator provides no evidence other than increased cost or inconvenience" the application for an alternative closure will be considered incomplete.⁵³ Despite the *USWAG* court's suggestion that any consideration of cost may be contrary to the statute, EPA indicates it will consider costs, so long as there are other factors to consider as well. In line with its other proposed changes, this interpretation further widens EPA's ability to grant extensions

V. Conclusion

This trilogy of coal ash rules, amendments, and revisions has demonstrated a clash in executive branch priorities between the administrations. Although the Trump administration would have preferred to delay closure of coal ash impoundments, the *USWAG* decision tasked the Trump EPA with drafting a coal ash rule that is stronger than the 2015 Rule. At first glance, the Trump EPA has adhered to its mandate, now requiring the closure of all unlined and clay-lined coal ash impoundments. But upon closer inspection, the Trump EPA has subtly continued its deregulatory agenda by considering non-coal ash waste, adding new extensions, and allowing the consideration of cost.

If the EPA finalizes the 2019 Proposed Rule as currently written, the *USWAG* decision will have had limited lasting consequence. If a future court attempts to similarly order the Trump EPA to tighten its regulations, it would be wise to learn from the *USWAG* example and provide more detailed mandates that safeguard against backsliding in other provisions of the rules.

⁴⁹ *USWAG* 901 F.3d at 448.

⁵⁰ *Id.* at 448–49.

⁵¹ *Id.* at 449.

⁵² 84 Fed. Reg. at 65,954 (emphasis added).

⁵³ *Id.*