



## Federal Court Partially Vacates U.S. EPA's 2015 Coal Combustion Residuals Rule

On August 21, 2018, the D.C. Circuit Court of Appeals issued its Opinion in *Utility Solid Waste Activities Group, et al. v. EPA*, addressing the consolidated petitions challenging the United States Environmental Protection Agency's (EPA) Coal Combustion Residuals (CCR) Rule. The Court largely upheld the challenges raised by environmental groups and denied the challenges raised by industry groups. A copy of the Opinion is available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/0/5A6D02C8038BA2CA852582F0004E0D37/\\$file/15-1219-1746578.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/0/5A6D02C8038BA2CA852582F0004E0D37/$file/15-1219-1746578.pdf).

After years of studying CCR and public pressure stemming from catastrophic failures like the 2008 incident at the Tennessee Valley Authority's Kingston, Tennessee facility, EPA promulgated the CCR Rule in 2015. For the first time since the federal Resource Conservation and Recovery Act was enacted in 1976, the Rule established minimum national "Subtitle D" criteria for existing and new CCR landfills and surface impoundments operated by electric utilities and independent power plants.

Not surprisingly, the Rule was challenged shortly after it was promulgated by a group of environmental organizations, known collectively as the "Environmental Petitioners," and several groups of industry groups, known collectively as the "Industry Petitioners." On June 14, 2016, the Court granted EPA's motion to remand certain portions of the CCR Rule. Shortly before the Court held oral argument in November 2017, EPA filed a motion seeking voluntary remand on specific provisions of the CCR Rule that remained at issue in the litigation. More than three years after the Rule was challenged, the Court issued a lengthy 72-page opinion largely upholding the challenges of the Environmental Petitioners and denying the challenges of the Industry Petitioners.

Here is a quick summary of the key points from the Court's Opinion:

1. The Court granted EPA's motion for a voluntary remand on three parts of the Rule:
  - The definition of "Coal Residuals Piles" as discussed in 40 C.F.R. § 257.53;
  - The 12,400-ton "beneficial use" threshold discussed in 40 C.F.R. § 257.53; and
  - The alternative groundwater protection standards discussed in 40 C.F.R. § 257.95(h)(2).

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### CONTACT

**DONALD C. BLUEDORN II**

*dbluedorn@babstcalland.com*  
412.394.5450

**GARY E. STEINBAUER**

*gsteinbauer@babstcalland.com*  
412.394.6590

**Pittsburgh, PA**

Two Gateway Center  
603 Stanwix Street  
Sixth Floor  
Pittsburgh, PA 15222  
412.394.5400

**BABSTCALLAND.COM**

The Court denied EPA's motion to remand the provisions pertaining to inactive surface impoundments and landfills at active power plants (40 C.F.R. §§ 257.50(c) and 257.100), and inactive surface impoundments at inactive power plants (40 C.F.R. § 257.50(e)).

2. The Court granted the Environmental Petitioners' challenges on the following points, vacating and remanding the pertinent portions of the Rule:

- EPA failed to require the closure or retrofit of unlined surface impoundments (see 40 C.F.R. § 257.101(a));
- EPA failed in classifying clay-lined impoundments as "lined" (see 40 C.F.R. § 257.71(a)(1)(i)); and
- EPA failed by exempting inactive surface impoundments at inactive power plants from regulation (see 40 C.F.R. § 257.50(e)).

The Court rejected the Environmental Petitioners' challenges to the Rule's public notice provisions as untimely.

3. The Court denied all of the Industry Petitioners' challenges, holding that: (a) EPA has authority to regulate inactive impoundments; (b) EPA provided sufficient notice of its intention to apply the aquifer location criteria to existing impoundments; (c) EPA did not arbitrarily issue location requirements based on seismic impact zones; and (d) EPA did not arbitrarily impose temporary closure procedures.

In sum, the Court vacated and remanded significant portions of the CCR Rule and did so in a way that likely will limit EPA's flexibility on remand.

If you have any questions about the D.C. Circuit's August 21, 2018 Opinion on the CCR Rule, please contact Donald C. Bluedorn II at (412) 394-5450 or [dbluedorn@babstcalland.com](mailto:dbluedorn@babstcalland.com), or Gary E. Steinbauer at (412) 394-6590 or [gsteinbauer@babstcalland.com](mailto:gsteinbauer@babstcalland.com).

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