

4th Circ. Opinion Curtails Reach Of Clean Water Act

By Michael Phillis

Law360 (September 18, 2018, 9:32 PM EDT) -- A recent Fourth Circuit opinion that Dominion Energy Inc.'s coal ash settling ponds aren't considered a "point source" of pollution under the Clean Water Act limits environmental groups in bringing citizen suits to control pollution from similar ponds, experts say.

In a win for industry, a Fourth Circuit panel held Sept. 12 that Dominion Energy's coal ash ponds in Chesapeake, Virginia, aren't subject to the CWA because they don't convey a measurable amount of a pollutant — in this case, arsenic — into navigable waters. And although the coal ash ponds aren't considered a point source under the CWA, the ponds are subject to the Resource Conservation and Recovery Act, or RCRA, meaning there's no gap in the regulations, the panel said.

Yet experts say the ruling will make it harder for environmental groups to go after alleged pollution from the ponds because RCRA citizen suits are harder to win. They are also watching to see whether the Fourth Circuit's logic in the Dominion case will be adopted by the Sixth Circuit, which has heard two similar coal ash cases. And they say the Dominion decision will be significant for the Southeast region, where pouring rain from Hurricane Florence has caused serious flooding.

Experts say the ruling prevents environmental groups and other advocates from using citizen suits under the CWA to target certain coal ash ponds. Although the RCRA also provides a means for citizens to challenge alleged environmental threats, the standards for bringing those suits are much higher, according to Pat Parenteau, a professor at Vermont Law School.

RCRA actions are based on demonstrating "imminent and substantial endangerment" to health or the environment.

"By contrast, citizen suits under the CWA are a piece of cake: Just prove there is a discharge from a point source," he said. "And once a source is subject to the permit requirements, subsequent enforcement becomes even easier because sources must self-report any violation."

Paulina Williams, special counsel at Baker Botts LLP, said the Dominion case is significant because of the limit it places on what qualifies as a point source and is therefore subject to the CWA.

"I think it is an important case with respect to a wide variety of potential sources that were at risk of being swept up in this creative approach to the Clean Water Act," Williams said.

Such cases get at the power of the law to allow the public, which includes environmental groups, to allege that a company is violating the CWA, said Frank Holleman of the Southern Environmental Law Center, who worked on the Dominion case.

Holleman said citizen suits are a necessary tool to strictly enforce the CWA's pollution limits. He believes state and federal regulators don't do enough to enforce pollution rules because of the influence industry groups wield.

Environmentalists maintain that the Dominion ruling doesn't impact all coal ash ponds. The decision may have established a distinction between active and inactive coal ash ponds, according to Abel Russ, a senior attorney with the Environmental Integrity Project.

An active coal ash pond may discharge wastewater through a designated outfall and be a point source subject to the CWA — as was historically the case for Dominion. But in 2014, Dominion stopped producing coal ash and started closing its coal ash sites. The case decided by the Fourth Circuit involved the seepage of the pollution not through an outfall but through groundwater into a nearby river and creek.

"One thing environmental groups can do is focus their Clean Water Act citizen suit energy on active sites," Russ said.

Parenteau said that because RCRA already covers solid waste such as coal ash, it likely influenced the court's decision and made it easier to say coal ash ponds aren't also subject to the CWA.

"Frankly, from a policy standpoint, if EPA's regulations for coal ash were what they should be, [RCRA] is the better way to deal with it," Parenteau said.

Coal ash regulations themselves are in flux. The Trump administration has moved to loosen rules around coal ash and worked to undo an effort by the Obama administration to strengthen the law. The EPA finalized an initial set of changes in July that includes extending timelines for closing coal ash ponds and landfills.

Yet on the other hand, the D.C. Circuit in August partially sided with environmental groups who said the Obama-era effort didn't go far enough. The panel said an Obama administration regulation not to require unlined surface impoundments be closed was arbitrary and capricious, as was "exempting inactive surface impoundments at inactive power plants from regulation."

And the limits imposed on CWA coal ash cases by the Fourth Circuit could spread if the court's reasoning is used in a similar coal ash-related case before the Sixth Circuit.

In the Sixth Circuit case, which was argued in August, Kentucky Utilities Co. said in a brief that because "ash ponds do not 'convey' anything from 'one place to another,'" they don't meet the definition of a point source.

The Fourth Circuit had used similar reasoning to reach its ruling in the Dominion case. The similarities between the arguments in both cases mean there's a "pretty high possibility" the Sixth Circuit's eventual ruling could come out the same way as the Fourth Circuit, said David Chung, a partner with Crowell & Moring LLP who has worked on briefs for industry group amici in other CWA cases.

And while the Dominion case focuses on whether the CWA is broad enough to regulate seepage from coal ash ponds and doesn't make new arguments on the groundwater issue, it is part of a larger struggle between environmental and industry groups over the law's reach.

The Dominion ruling skirted a bigger-picture question of whether the CWA applies to groundwater — an issue that is bubbling up to the U.S. Supreme Court in appeals from a pair of Fourth and Ninth Circuit rulings.

A separate Fourth Circuit panel in April held in *Upstate Forever v. Kinder Morgan Energy Partners LP* that the CWA applies if there is a "direct hydrological connection" between the pollutants' path through groundwater and into navigable waters covered by the CWA. A couple months earlier, the Ninth Circuit had issued a similar ruling in *Wildlife Fund et al. v. County of Maui* that concerned pollution traveling from a wastewater injection well through groundwater and into the Pacific Ocean.

Kentucky Utilities has argued to the Sixth Circuit those decisions "are mistaken" on the direct hydrological connection issue and don't align with the text of the CWA.

And all three members of the panel that decided the Dominion coal ash case had voted in May to rehear en banc the Kinder Morgan decision. In the coal ash ruling, the court said, "As Dominion does not challenge the district court's factual findings on appeal, we apply *Upstate Forever*."

Chung of Crowell & Moring said the Dominion opinion's language on the groundwater issue was awkward.

"I don't think they wanted to be in a position where they were trying to write around the Kinder Morgan analysis," Chung said. "They knew they were hemmed in there. They could have very squarely said, 'We already solved this as a matter of law. Let's move on.' So, I found it a bit awkward that they kind of couched it."

The Fourth Circuit covers the area hit by Hurricane Florence, which has dumped several feet of rain on some parts of North Carolina, leading to major floods. Duke Energy on Saturday said the hurricane caused a coal ash release from one of its landfills, in Wilmington, North Carolina.

As significant flooding events become more common because of climate change, there's more danger from coal ash pits that are often located near bodies of water, said Bridget Lee, an attorney with the Sierra Club.

"If you have coal ash mixed with water sitting in an unlined pit next to a waterway — like at the Chesapeake site — coal ash contaminants will migrate through groundwater and make their way into nearby rivers," she said, adding that heavy rainfall can accelerate that migration.

She said the increase in extreme weather events "underscores the need for communities living near coal ash disposal sites to have every tool available — whether that be RCRA or the Clean Water Act — to protect themselves."

--Additional reporting by Adam Lidgett. Editing by Jill Coffey and Breda Lund.

Correction: An earlier story misspelled the name of an attorney. The error has been corrected.