



Legal & Regulatory Conference

IN PARTNERSHIP WITH

GRIDLIANCE

A background image showing a group of people in a professional setting, possibly a conference or meeting. The image is semi-transparent and overlaid with a blue tint. It shows the profiles and faces of several individuals engaged in conversation.

Examine Together



LATHAM & WATKINS^{LLP}



The Clean Water Act and Coal Ash:
Proactive Strategies to Minimize Risk

APPA Legal and Regulatory Conference October 2018

NGO FOCUS ON COAL ASH DISPOSAL FACILITIES

Prairie River Network Groundwater Report (March 2018)

- Reviews groundwater monitoring data reported pursuant to CCR Rule and whether any values exceed federal or Illinois pollutant-specific standards
- Identified alleged exceedances of standards for most Illinois facilities

EIP “Ash Tracker” (ongoing)

- Links to facility-specific data and alleges “pollutants above safe levels” (federal levels only)

EarthJustice Coal Ash Report (2013), Coal Ash Disposal Tracker (2015)

- Report discusses coal ash and permits for each facility, noting whether coal ash pollutants are monitored; tracker notes how many disposal units are operated
- List includes W.A. Parish and Limestone facilities



TRENDS IN CLEAN WATER ACT CITIZEN SUITS

Increasingly used as means of attacking coal ash storage and disposal facilities with mixed results.

Courts upholding theory that coal ash discharges/seeps into groundwater are violations of CWA:

- *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC* (M.D.N.C. 2015)

Courts rejecting theory:

- *Cape Fear River Watch Inc. v. Duke Energy Progress, Inc.* (E.D.N.C. 2014)
- *Tenn. Clean Water Network, et al., v. Tenn. Valley Auth. (TVA)* (6th Cir. 2018)
- *Sierra Club v. Va. Elec. & Power Co.* (4th Cir. 2018)

TRENDS IN CLEAN WATER ACT CITIZEN SUITS (*continued*)

Increasingly used as means of attacking coal ash storage and disposal facilities with mixed results.

Circuit split:

- 9th Circuit upheld “groundwater conduit” theory in UIC context (*Hawai’i Wildlife Fund v. Co of Maui* (Feb. 2018) (cert. pending))
- 4th Circuit adopted theory in context of ruptured underground pipeline (*Upstate Forever v. Kinder Morgan Energy Partners L.P.* (Apr. 2018) (cert. pending))
- Split panel of 6th Circuit rejected theory (*Tenn. Clean Water Network, et al., v. Tenn. Valley Auth*) (cert. petition anticipated)

Other CWA claims asserted:

- “Unpermitted seeps” discharging into WOTUS
- Permit condition violations (“removed substances,” “operation and maintenance” conditions)
- Unpermitted discharge into waste management impoundments that are WOTUS

COAL COMBUSTION RESIDUAL (CCR) RULE & GROUNDWATER

CCR rule includes comprehensive groundwater monitoring and corrective action requirements

Current CCR Rule Requirements

- Structural Integrity
- Groundwater Protection
- Corrective Action
- Operating Criteria
- Recordkeeping and Notification
- Closure



CCR RULE & GROUNDWATER (*continued*)

Citizen Suits: Two suits filed against Duke in M.D.N.C. in 2017 for alleged failure to have proper closure plan in place – dismissed March 29, 2018 as not ripe for decision – implementation of plan uncertain, can change

CCR Rule Amendments (July 2018)

- Allows states with approved CCR permit programs to set alternate performance standards
- Revises groundwater protection standards for constituents without existing drinking water standards
- Provides additional time for units triggering closure to cease receiving wastes and initiate closure



CCR RULE LITIGATION

Utility Solid Waste Activities Group v. EPA, (August 21, 2018, D.C. Circuit)

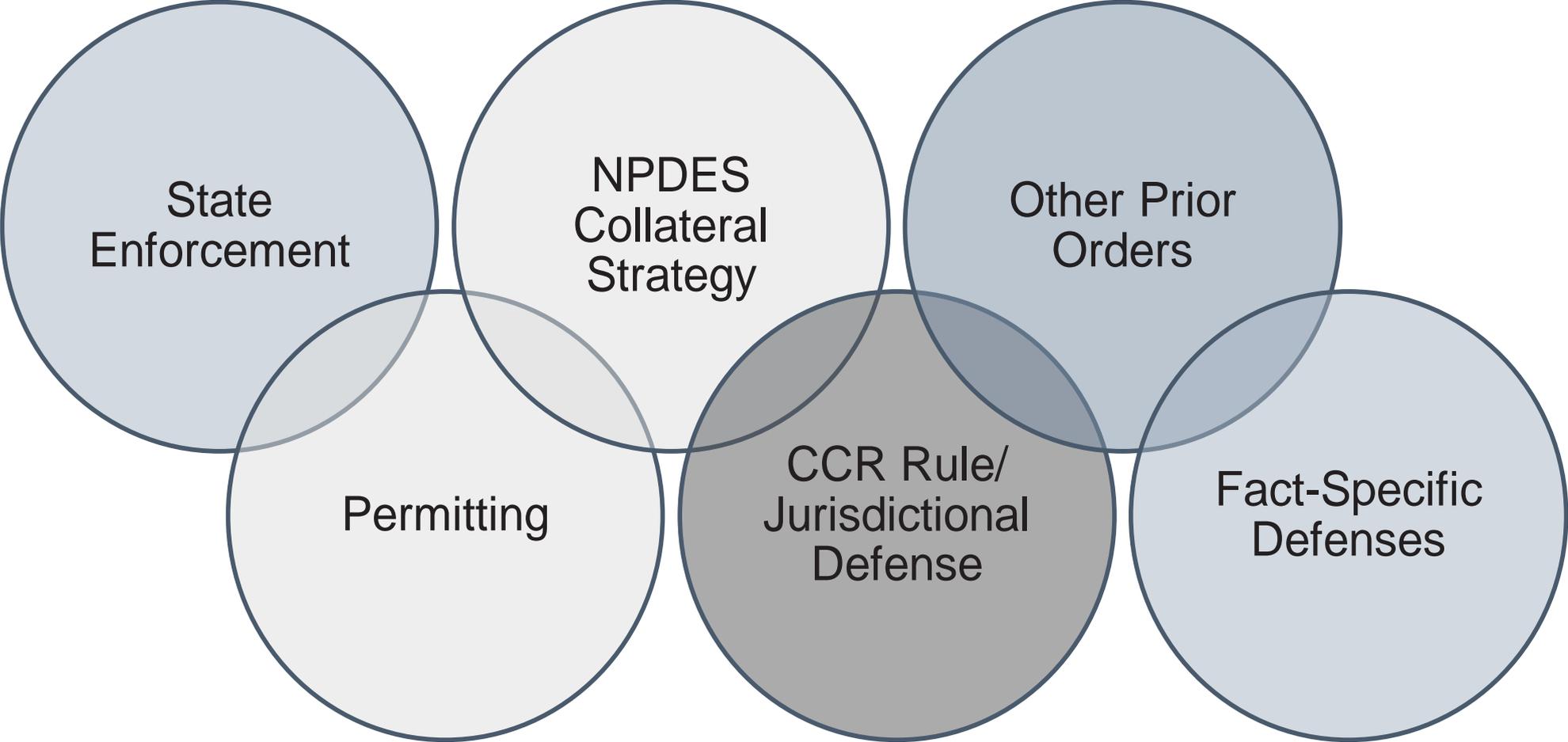
- Finds unlined surface impoundments pose “a substantial present or potential hazard to human health and the environment”: *vacates 40 C.F.R. 257.101(a)(1)*.
- Finds EPA acted arbitrarily and capriciously in concluding that existing clay-lined surface impoundments should count as “lined”: *vacates 40 CFR 257.71(a)(1)(i)*.
- Finds exemption from regulation of existing inactive surface impoundments at inactive facilities to be arbitrary and capricious: *vacates 40 C.F.R. § 257.50(e)*.
- **Rejects** NGO’s claims challenging adequacy of posting CCR data on internet sites.
- **Rejects** all industry claims.
- **Grants** voluntary remand for coal residuals’ pile size and 12,400 ton threshold for beneficial reuse.
- **Declines** request for voluntary remand on inactive surface impoundments.

CCR RULE LITIGATION: IMPLICATIONS

Utility Solid Waste Activities Group v. EPA, (August 21, 2018, D.C. Circuit)

- Will all ash impoundments without composite liners be required to retrofit or close – and if so, when?
 - What does vacatur of 40 C.F.R. 257.101(a)(1) mean?
- What does the ruling mean for EPA's recent revisions to the CCR rule?
 - Alternative performance standards
 - Revised groundwater standards
 - Additional time to stop receiving wastes and initiate closure
- What happens next?
 - New rulemaking?
 - Petition for rehearing?
 - Petition for certiorari?
- Are there implications for the eNGO CWA suits over coal ash?

STRATEGIC OPTIONS TO MITIGATE POTENTIAL LITIGATION RISK



QUESTIONS?



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Karl Karg joined Latham after serving as an enforcement attorney at the U.S. EPA Region 5. His practice includes enforcement defense, litigation, crisis response and management, permitting and compliance counseling, and transactional counseling. He is particularly experienced in the defense of US Department of Justice/EPA and state enforcement actions and citizen suits under the Clean Air Act, CERCLA, the Clean Water Act, RCRA and a variety of other environmental statutes.