

Virginia Ash Pond Seeps Violate CWA, But Do Not Warrant Civil Penalty

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A recent federal court ruling in a Sierra Club lawsuit against Dominion Virginia Power alleging violations of the **Clean Water Act (CWA)** raises key questions about how other courts will interpret “point source” and “navigable waters” relative to ash ponds and groundwater releases, and whether a reasoned cost-benefit analysis can be used to substantially mitigate civil penalties and remedy selection.

On March 23, 2017, a federal judge ruled that arsenic seeping from coal ash ponds to groundwater from a Dominion power plant violated the CWA. While Sierra Club prevailed on its CWA seepage claim, the court denied the group’s demand for civil penalties and request that Dominion remove the coal ash from its ponds regardless of cost.

This ruling expounds expansive interpretations of “point source” and “navigable waters” relative to ash pond seeps, which may give rise to increased CWA enforcement. However, the court’s cost-benefit remedy analysis indicates that dischargers may not be subject to a costly remedy when there is minimal demonstrated impact to human health or the environment.

First, the court determined that Dominion’s coal ash ponds and coal piles qualify as a “point source” and groundwater directly connected to surface waters qualify as “navigable waters” as those terms are used in the CWA. The CWA prohibits the discharge of pollutants from “point sources” into “navigable waters” without a discharge permit. Given that Dominion did not have a permit allowing seeps containing arsenic—a constituent commonly found in coal ash—to discharge to groundwater, it was deemed having violated the CWA.

The courts are split on whether the CWA covers unpermitted seeps to groundwater directly connected to surface water. Ultimately, this court joined a growing number of jurisdictions in holding that groundwater with a direct hydrological connection to surface water is covered. On the issue of whether the ash ponds and coal piles constitute a “point source,” the court found they did because “Dominion created those piles specifically for coal ash, and they channel the pollutants away from the old power plant and directly into the groundwater.”

While the CWA’s definition of navigable waters does not expressly include groundwater, over the past 10 years courts have increasingly found the CWA applies to groundwater with a direct hydrological connection to surface waters that are themselves “navigable waters” or “waters of the U.S.” This rationale is applied when there is a direct hydrological connection between groundwater and surface water, discharges to groundwater are essentially discharges to jurisdictional surface waters.

In terms of remedy, the court rejected Sierra Club’s calls for civil penalties and instead required Dominion to monitor surrounding water bodies, sediment, and aquatic life for arsenic. In its analysis, the court highlighted Dominion’s good faith efforts to comply, lack of environmental harm, cooperation, and general permit compliance. This approach indicates that certain factors may mitigate a civil penalty, or perhaps even obviate the need for a civil penalty at all. The court also denied Sierra Club’s request that Dominion move three million tons of coal ash to a landfill, because Sierra Club did not demonstrate all of the factors necessary to secure a permanent injunction—particularly, that removal would be economically reasonable given the lack of adverse impact to the environment.

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