G|K ENVIRONMENTAL LAW

VOLUME 1 | NOVEMBER 2013

U.S. District Court Rules on Various RCRA Claims Regarding the Statutory Requirement to Review and, As Necessary, Revise Existing Regulations

By Chris S. Leason

On October 29, 2013, the U.S. District Court for the District of Columbia (the "Court") issued a memorandum opinion resolving cross motions for summary judgment regarding the application of section 2002(b) of the federal Resource Conservation and Recovery Act ("RCRA") to various U.S. Environmental Protection Agency ("EPA" or "Agency") "solid" and "hazardous" waste regulations. RCRA § 2002(b) requires EPA to review and, as necessary, revise its "solid" and "hazardous" waste regulations at least every three years. This is the first instance of litigation premised on RCRA § 2002(b).

The court concluded that EPA failed to review its "solid waste" regulations applicable to coal ash in violation of RCRA § 2002(b). This decision will likely pave the way for additional litigation by environmental plaintiffs seeking Court orders requiring EPA to review its RCRA regulations, in general, and exclusions and exemptions from the definitions of "solid" and "hazardous waste," in particular.

SUMMARY OF LITIGATION

Environmental plaintiffs challenged EPA's alleged failures to comply with RCRA § 2002(b) in three areas:

(1) review of the regulation (40 C.F.R. § 261.4(b)(4)) that, based on EPA's Bevill Amendment determination for coal ash, identifies coal ash as a "solid waste," but not a "hazardous waste;"

(2) review of EPA's "solid waste" regulations (40 C.F.R. §§ 257.3-3, 257.3-4, and 257.3-7) to determine if revisions are necessary for coal ash; and,

(3) review of EPA's toxicity characteristic and corresponding toxicity characteristic leachate procedure ("TCLP") test (40 C.F.R. § 261.24) as applied to coal ash.

Headwaters Resources, Inc. and Boral Material Technologies, marketers of coal combustion products, also challenged EPA's failure to review its "solid waste" regulations as applied to coal combustion products. The National Mining Association and Utility Solid Waste Activities Group intervened in the litigation.

THE COURT'S MEMORANDUM OPINION

I. The Bevill Determination for Coal Ash and 40 C.F.R. § 261.4(b)(7) Are Not Subject to RCRA § 2002(b)

As to the first issue, without opining whether EPA's regulation implementing the Bevill determination for coal ash may be discretionarily "reopened" by EPA (as EPA asserted in its pleadings), or whether the determination and resulting regulation were one-time actions (as asserted by industry intervenors), the Court concluded that RCRA § 2002(b) did not apply to EPA's regulation deeming coal ash a "solid waste," but not a "hazardous waste." According to the Court, "the Bevill Amendment removes the regulation of coal ash as a hazardous waste from the RCRA's general regulatory scheme by creating a different process for regulating coal ash as hazardous waste."

FOR ADDITIONAL INFORMATION, PLEASE CONTACT:
Chris S. Leason, attorney
Phone: 602-530-8059 - Email: chris.leason@gknet.com

Gallagher & Kennedy
2575 East Camelback Road - Phoenix, Arizona 85016-9225

G|K ENVIRONMENTAL LAW

VOLUME 1 | NOVEMBER 2013

By analogy, this conclusion means that EPA's regulatory exclusion from the definition of "hazardous waste" for extraction, beneficiation, and the twenty mineral processing streams set forth in 40 C.F.R. § 261.4(b)(7), and the result of two Bevill determinations, would not be subject to a mandatory (non-discretionary) review and, as necessary, revision by EPA every three years.

However, the decision leaves open the possibility that EPA may attempt to reopen an earlier Bevill determination or 40 C.F.R. § 261.4(b)(7) *sua sponte*. For example, in a May 12, 1997 EPA Land Disposal Restriction ("LDR") proposed rulemaking (62 Fed. Reg. 26,041, 26,052), EPA solicited comment on whether the Bevill-excluded status of certain mineral processing streams should be reevaluated in light of purported damage cases. Trade associations and industry asserted in detailed comments that the Bevill determinations and, in turn, 40 C.F.R. § 261.4(b)(7) were one-time actions that could not be reopened by EPA. In the final LDR rule, EPA decided not to make changes to the Bevill-excluded status of any mineral processing waste streams. 63 Fed. Reg. 28,556, 28,580 (May 26, 1998).

II. EPA's "Solid Waste" Regulations Are Subject to RCRA § 2002(b)

As to the second issue, the Court concluded that EPA failed to evaluate its existing "solid waste" regulations to determine whether changes were necessary to address coal ash, despite the fact that EPA has an ongoing rulemaking on this issue (in its briefing, EPA conceded application of RCRA § 2002(b) to this issue, but requested six months to provide a path forward to the Court). The Court concluded that EPA failed to review its existing "solid waste" regulations as they apply to coal ash to determine whether changes are necessary. The Court mandated that EPA provide a report to the Court within sixty days of the status of its review of the "solid waste" regulations applicable to coal ash and include a schedule for the Agency to complete its review and, as necessary, to revise its regulations.

This part of the Court's holding is significant for two reasons. First, environmental plaintiffs may initiate litigation against EPA alleging the Agency's failure to evaluate the sufficiency of its "solid waste" regulations for other Bevill-excluded waste streams violates RCRA § 2002(b). Such legal challenges could, if successful, result in a Court order requiring EPA to evaluate whether additional "solid waste" regulations are necessary for the extraction and beneficiation wastes identified in 40 C.F.R. § 261.4(b)(7) and (b)(7)(i), and for the twenty enumerated mineral processing streams identified in 40 C.F.R. § 261.4(b)(7)(ii).

Second, environmental plaintiffs may seek Court orders requiring EPA to review existing regulatory exclusions and exemptions from the definition of "solid" or "hazardous" waste to determine whether changes are necessary. This would be a monumental undertaking by EPA.

III. Plaintiffs Lack Standing to Challenge the Toxicity Characteristic and TCLP Test

As to the last issue, the Court concluded that environmental plaintiffs did not have Article III standing to challenge the Agency's failure to review the toxicity characteristic and TCLP test as applied to coal ash. Because coal ash is expressly excluded from regulation as "hazardous waste" by virtue of the Bevill determination and 40 C.F.R. § 261.4(b)(4), the toxicity characteristic is not applicable to it (coal ash could never become a "hazardous waste" even if it exhibited the toxicity characteristic because it is, at most, a "solid waste" per 40 C.F.R. § 261.4(b)(4)). Thus, the Court reasoned that even if it granted plaintiffs' requested relief (an order requiring EPA to evaluate whether revisions are necessary to the toxicity characteristic and TCLP test), plaintiffs' alleged injuries could not be remedied because coal ash would not be a "hazardous waste," even if it exhibited the toxicity characteristic based on revised criteria and a revised TCLP test.

2575 East Camelback Road | Phoenix, Arizona 85016-9225 | P: 602-530-8059 | F: 602-530-8500 | chris.leason@gknet.com