



Daily News

EPA Rights Review Of Ash Landfill Unlikely To Spur Discrimination Finding

Posted: Aug. 29, 2014

EPA's Office of Civil Rights (OCR) is launching a fresh investigation of Alabama residents' claim that state officials violated their civil rights by approving a landfill expansion to handle coal ash from a major spill, but equity advocates downplay prospects that the review will spur a first-time federal finding of rights violations against the state.

"They [EPA] have investigated civil rights claims before, but whenever they do they have failed to provide any meaningful relief. What's going to be precedential is if they provide meaningful relief," says one environmentalist attorney who has litigated the issue in the past. Any significance from the investigation could therefore be in whatever pollution control measures or other steps the landfill agrees to take to resolve the rights claims.

Title VI of the Civil Rights Act generally bars recipients of federal funds from violating the rights law. But the Supreme Court in *Alexander v. Sandoval* ruled there is no private right to sue unless plaintiffs can show intentional discrimination. Since then, EPA's Title VI investigations have been stymied and the agency has never issued a finding of discrimination in response to a complaint, which would result in the suspension of federal funds. Former EPA Administrator Lisa Jackson made environmental justice a top priority for the agency at the start of the Obama administration, and pressured OCR to address a backlog of rights law claims.

EPA originally accepted an earlier complaint against the Alabama landfill expansion in 2012, vowing to investigate claims by petitioners -- 54 poor black residents of Perry County, AL, that they were adversely and disparately impacted by the transfer of Tennessee Valley Authority (TVA) coal ash waste to their community.

TVA was aiming to use the Arrowhead Landfill near the residents to store waste from a massive ash spill that occurred in December 2008, expanding the facility by almost 170 acres to accommodate the extra waste.

The residents allege that odors and other effects from the expansion have generally reduced the quality of life in the area, in addition to potential hazards from coal ash. But EPA dropped its investigation within months as it was the subject of a civil suit, *Abrahams et al. v. Phill-Con Services, LLC et al.*, which settled out of court.

Second Complaint

Residents filed a second complaint with OCR in 2013, after Alabama's Department of Environmental Management (ADEM) renewed Arrowhead's expansion permit. EPA in a June 27, 2013, letter to an Earthjustice lawyer representing the residents said it would start a new rights review of the landfill, leading to the investigation which began this month.

EPA investigators were in Perry County Aug. 12-14 to investigate the alleged Title VI violation, an EPA spokeswoman says.

"EPA is committed to thoroughly evaluating all allegations accepted for investigation. While in Perry County, the investigators interviewed the complainants and other witnesses, and inspected the community allegedly impacted by the landfill. Earthjustice, which represents the complainants in this matter, was present to facilitate the interviews. The OCR has also requested and received information from ADEM," the spokeswoman says.

But environmentalists are downplaying any major precedent from the assessment, saying the agency is almost certain not to make what would be a landmark finding that the residents were "subjected to discrimination" by the state government's permit to expand the landfill, which would trigger the loss of federal funding to the state.

However, EPA could still negotiate lesser remedies as part of its investigation, though such measures are unlikely to be as strict as what advocates are seeking.

But any agency action would give some indication of how EPA will apply its rarely-used Title VI authority, the attorney notes. "EPA has done a poor job of enforcing Title VI, even very recently. If, out of this case, they find that Title VI was violated, then I think we will have some idea not only of how this administration will enforce Title VI, but we'll also have some idea of what EPA thinks will have to be present in order to take action."

"The hammer of Title VI is to withdraw federal funds, but that's rarely used, especially today. Usually what happens is some lesser remedy," says a second environmentalist attorney.

Applicable Regulations

An industry source says even though a rescission of federal funding -- the penalty for violating Title VI of the rights law -- "is never going to happen," EPA is still likely to require some changes at the landfill. "At the very least, they're going to go through that site and make sure that they're complying with every applicable regulation."

The second environmentalist attorney says complainants are attacking Alabama's decision to allow Arrowhead to expand and store coal ash without improving environmental and public-health safeguards at the facility, rather than the decision to site coal waste there at all. "It is not about EPA's decision to send or accept the coal ash there -- but if you are dumping it there, the state should protect people's health and the environment," the source says.

How EPA assesses the risks from the coal residuals could be affected by the content of its upcoming rule that will regulate disposal of the waste under Resource Conservation & Recovery Act (RCRA) standards -- either RCRA subtitle D, which governs "solid waste," or the more stringent subtitle C, which governs "hazardous waste."

While EPA seems likely to apply subtitle D despite environmentalists' demands for stricter subtitle C rules, the Arrowhead landfill might need improvements even under the less-strict standard, the industry source says. "The facility isn't configured in the way a RCRA subtitle D facility is, so there may be issues over whether the facility can handle the material being deposited there -- we'll have to see what EPA turns up when it investigates."

But there is a chance the rights case could be decided without reference to coal ash at all, which would weaken its precedential value in the environmental arena, the first attorney says.

"It's possible that they could find there was some exposure to toxic materials from coal ash, but it's more likely that the case will be decided based on the presence of odors, bird droppings, that kind of thing" from the landfill affecting the residents. "I don't think it's going to be a toxics issue," the source says. -- *David LaRoss* (dlaross@jwpnews.com)