Roth: Coal ash disposal and verb tense

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Coal ash disposal and verb tense

Back in 2014, the Obama administration, through the Environmental Protection Agency, passed a final rule called the Disposal of Coal Combustion Residuals from Electric Utilities regarding CCRs (coal combustion residuals or "coal ash") disposal.

The rule addressed the concern that coal ash contains mercury, arsenic, and cadmium, and can and has leaked into groundwater,

blown into the air, and decimated the surface.

But keeping in line with the idea you can't please everyone, the rule was considered too lenient for some and too stringent for others. In fact, those in the former camp were dismayed the rule did not classify coal ash as toxic waste. What the final rule did do was to create regulations and standards concerning the disposal of the byproduct that comes from burning coal for energy.

Fast-forward to last month when the Trump administration's Scott Pruitt indicated the EPA would reconsider the rule after being sued over it by Utility Solid Waste Activities Group, a utility company industry group, and AES Puerto Rico, which operates a coal-fired power plant.

Those parties asserted the rule went too far in its regulation over inactive pits, where coal ash has been deposited but is not actively being added to, and active pits, those areas currently being filled with ash.

This past week, in oral argument at the D.C. Circuit, the parties underwent a grammar lesson, which concentrated on whether the EPA's authority extended to inactive coal ash pits.

A focus on where the waste "is disposed of" was said to concern the present tense, or active coal pits. It was argued by petitioners that the EPA had "limited statutory authority" over inactive pits that had not seen new coal ash in some time. This argument essentially suggests the reach of the EPA regulation is only on the disposal activity and not on the lingering environmental risks that remain.

This discussion over the tense of the statute and how it affected the EPA's authority took a majority of the hearing and its detailed nuances brings into focus the reach of environmental regulation in America.

The EPA expressed its desire to address the issues in the rule through its rulemaking process. One judge on the D.C. Circuit voiced her concern that "nothing would ever get decided" if that were the route taken, seemingly a nod to the current administration's multiple efforts to prop up the waning coal industry.

It seems to me that when one is arguing the breadth or limits to a new rule, like the Coal Ash Rule, it's most important to look to the enabling act and its intended reach. In this case, the enabling act is the Resource Conservation and Recovery Act (RCRA), which typically creates the framework for hazardous and non-hazardous solid wastes.

The Coal Ash Rule was promulgated under sub-part D, similar to open dumping of wastes, operation of municipal and industrial waste sites, and location restrictions like flood plains and wetlands.

It may be nuanced to argue verb tense, but it seems to me a regulation is effective only if it accomplishes its intended purpose to protect the public over the course of the hazardous and non-hazardous materials' life, not just the act of someone "dumping" it somewhere at one single point in time.

"Safe disposal," in the eyes of the waste's nearest neighbor (and their water well), probably should include how it lingers in that disposal location.

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