Editor's Note: "Six Questions for…" is a regular *ASH at Work* feature in which leaders with unique insight affecting the coal ash beneficial use industry are asked to answer six questions.

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Ash at Work (AW): You've written a book about how to communicate with federal regulatory agencies. What are the most important points for people to keep in mind when communicating with regulators regarding a rulemaking under development?

Richard Stoll (RS): A really critical point: *start early*. As discussed in my book, it usually takes a few years for the EPA to take a rule from initial concept to finalization. There are plenty of opportunities for interested parties to weigh in before a proposed rule is developed, and it is smart to do this. Because once a proposed rule hits the Federal Register, the options the EPA may be left with before it goes final often become quite limited.

And like Chicago, where you should vote early and often, you should at least try keep communicating with the agency personnel as often as you can as the process moves along. Remember, this is officially "informal" rulemaking, so communicating with agency personnel both before and after a proposal is issued (in addition to your all-important written comments) is appropriate and usually allowed by agency staff.

And in any communications—whether related to rulemakings or not—another key point is to back up your requests/arguments/advocacy with *credible facts and/or data*. EPA people are always hearing that some proposal or policy is misguided, stupid, and/or counterproductive. If you have any chance of getting them to take your concerns seriously, you need to support your points with real facts/data. And don't use misleading facts/data, because there is a good chance that will eventually be discovered. Then your credibility will be called into question—never good when dealing with the EPA.

AW: In what ways has the EPA changed over the years in which you have practiced environmental law?

RS: Let me try a few quick points:

a. The rulemaking process has become much more time-consuming and complex. Back in "my day" at EPA (late '70s), we could issue an ambient air quality standard under the Clean Air Act (CAA) with a proposed rule followed by a final rule only a few months later—and the proposed and final Federal Register notices might run for fewer than 10 pages!
b. EPA keeps having more things to do with fewer resources to do them. The statutes Congress has passed give the EPA a mind-boggling number of rules to issue and update, and citizens groups keep bringing a mind-boggling number of lawsuits to force the EPA to do this. One good current example: the EPA has issued CAA "CISWI" rules for non-hazardous waste combustors. The rules—as usual—are quite ambiguous and confusing on many critical points. In past rules, the EPA has issued under the same CAA section; the EPA has issued follow-up guidance to clarify the EPA's intent. But the EPA now has so many pending mandates under court orders, statutory deadlines, and Obama climate initiatives that its staff doesn't have the time or resources to issue guidance for the CISWI rules.
c. One thing that has not changed: the EPA is staffed by a great number of high-quality professionals who take their jobs very seriously.

AW: What are the odds that the next presidential administration will roll back many of the environmental regulations promulgated by the Obama EPA?

RS: I presume you are speaking of a scenario in which a Republican becomes President. I would assume that for any *new* regulations, the agency would give far greater weight to realistic assumptions about costs and benefits than we have seen under the Obama EPA. I would also assume the agency would be more respectful of the limits of its statutory authority than we have seen under the Obama EPA. The Obama "Clean Power Plan," for instance, is a prime example of an earthshaking rule based on highly questionable statutory authority.

The "roll back" issue is more difficult. Plenty of recent DC Circuit and Supreme Court precedents allow a new administration to revoke or revise rules from a prior administration based on the new administration's policy preferences, so long as the reasons for the revocation or revisions are adequately explained.

But as a practical matter, such revocations or reversals could take time because of the need to go through notice-and-comment rulemaking. So some rules may already have been implemented or be well on their way to implementation by the time the new administration can finalize any revocations/reversals.

This would have to be assessed on a rule-by-rule basis depending on how fast the rule in question is required to be implemented and the nature of the rule. Under the Clean Power Plan (CPP), for instance, many of the emission reduction goals are not required for many years, so a new administration could have success in rolling back key elements of the CPP if it wants to do so (assuming the DC Circuit or the Supreme Court will not already have done so). And under the "Clean Water Rule," (or "WOTUS" to some) because of its "jurisdictional" nature, it would be easy for a new administration to roll it back to something more rational.

AW: What are the odds that major parts of the EPA's Resource Conservation and Recovery Act final rule for coal ash disposal will be overturned by litigation?

RS: Tough question, because these days especially, the way the DC Circuit may approach an EPA rule challenge can depend on the composition of the three-judge panel that is chosen (by lot) to hear the case. Some of the judges tend to sympathize with the EPA and/or citizens' groups, while other judges tend to be more supportive of regulated parties' views—especially when it appears there is little benefit for great costs.

Because I am participating as counsel in that litigation, I hesitate to handicap the success of any particular challenges. But I can pass on some good news for industry parties. The greatest fear for both electric utilities and beneficial use interests in the CCR rulemaking was that the EPA would choose to regulate CCRs under RCRA Subtitle C. Once the EPA chose to stick with Subtitle D in the final rule, the greatest fear for the utilities and beneficial use interests has been that the environmental group petitioners would convince the DC Circuit that the EPA should have regulated CCRs under RCRA Subtitle C, and that the Court would order the EPA to issue Subtitle C regulations for CCRs. The good news: in preliminary filings with the Court, the environmental parties have committed to the Court that they will not seek to raise the Subtitle C versus D issue.

AW: By the time litigation over coal ash disposal regulations is complete, utilities will likely be far along in implementing compliance. Has litigation become a less potent tool in combating overreaching regulations?

RS: Good question. Based on the proposed briefing schedule the parties have presented to the DC Circuit, it appears that oral argument on the case will not be held until fall 2016 at the earliest. And that means there is a very good chance we won't have a court decision until late 2016 or more likely early 2017.

Some parts of the CCR rule require early actions and capital expenditures—once those actions are taken and the money is spent, a court reversal of those parts of the CCR rule wouldn't be of much use to the victorious litigants. But other parts of the CCR rule may require significant longer-term annual operating expenses or may prohibit or restrict certain types of actions (such as placing more than 12,400 tons of CCR on the land). A court victory relating to those parts of the rule would still be a great benefit to the challenging parties, so I would still say litigation can be a "potent tool."

AW: If you could choose one thing that would improve environmental regulation in the United States, what would it be?

RS: Can I please have two?

a. Amend the EPA's basic organic statutes (CAA, RCRA, CWA, and so on) to take away the ability of parties to sue the EPA to undertake rulemakings. These "citizens deadline suits" allow citizens groups to set the EPA's agenda and the court-ordered deadlines force sloppy rulemakings that are in constant need of cleanup. Congress has not saddled any other federal agency with such a regime. Please see my piece in *Politico* for more on this (**http://www.politico.com/story/2012/01/do-we-still-need-epa-rule-deadlines-071300**). Back in the early 1970s, when we had really dirty air and burning rivers, these deadline suits might have had a place—no more please!
b. Amend the EPA's basic organic statutes to include—for all major rules going forward—a requirement that costs must be shown to be justified by the benefits. And this would have to be based on an honest, unbiased assessment of costs/benefits performed by some agency or board wholly independent of the EPA. Back in the early 1970s, when we had really dirty air and burning rivers, a regime allowing or requiring EPA to ignore or downplay costs might have had a place—no more please!

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