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The Coal Ash Rule Update: EPA Approves Some—But Not All—Proposed Revisions

*By Anthony G. Hopp and Libretta Stennes**

The authors of this article discuss the U.S. Environmental Protection Agency's revisions to the 2015 Coal Ash Rule, some of which were finalized recently. The Agency explained that it was proceeding in a piecemeal fashion because several states are considering whether to seek approval of their own Coal Combustion Residual permitting programs under the 2016 Water Infrastructural Improvements for the Nation Act ("WIIN"), and these partial revisions will provide those states with greater certainty as to how the Agency intends to implement the Coal Ash Rule and the WIIN Act.

The U.S. Environmental Protection Agency ("EPA") announced a long list of revisions to the 2015 Coal Ash Rule in March 2018. On July 17, 2018, EPA finalized some, but not all, of the revisions it proposed in March. EPA explained that it was proceeding in this piecemeal fashion because several states are considering whether to seek approval of their own Coal Combustion Residual ("CCR") permitting programs under the 2016 Water Infrastructural Improvements for the Nation ("WIIN") Act, and these partial revisions will provide those states with greater certainty as to how EPA intends to implement the Coal Ash Rule and the WIIN Act. EPA described the proposed changes it has not yet approved as "technical issues." Several of the July 2018 revisions apply only to states that have elected to promulgate their own CCR permitting programs under the WIIN Act.

The newly approved rule revisions fall into four categories:

- Extending the deadline by which facilities must close or cease the placement of waste in CCR impoundments "for cause" into certain situations;
- For the purpose of groundwater corrective action requirements, establishing alternative Ground Water Protection Standards ("GWPS") for constituents for which no maximum containment levels ("MCL") have been established;
- Allowing a participating state director to approve the suspension of

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groundwater monitoring at a CCR impoundment if a demonstration of “no migration” can be made; and

- Allowing a participating state director to issue certifications related to CCR impoundment sites in lieu of a professional engineer.

EXTENDING THE CLOSURE DEADLINE

Under the original Coal Ash Rule, an operator was required to initiate closure activities for any CCR landfill or impoundment within six months after determining that the surrounding groundwater showed an exceedance of GWPS, or after determining that the facility does not meet the applicable location criteria or does not meet minimum safety standards. Owners and operators of existing CCR surface impoundments are required under the existing rule to complete their evaluation of the applicable location criteria no later than October 17, 2018.

After considering comments both in favor of and in opposition to extending the deadline, EPA decided to extend the “closure for cause” trigger to October 31, 2020. EPA’s rationale for the extension was that it did not want owners and operators of CCR surface impoundments to be forced to make costly and irreversible changes when the closure regulations may be revised under a state-level WIIN Act plan. In addition, the closure requirements might change in connection with EPA’s efforts to harmonize its CCR regulations with related regulations, which are currently under review.

ALTERNATIVE RISK-BASED GROUNDWATER PROTECTION STANDARDS

The 2015 Coal Ash Rule required the owner or operator of a CCR surface impoundment to set its GWPS at the MCL or at “background.” An exceedance of the GWPS in groundwater monitoring data triggers corrective action. EPA noted that several commentators had urged it to adopt risk-based GWPS in lieu of background in situations where no MCL has been established. In response to the comments, EPA promulgated alternative risk-based GWPS for three constituents for which no MCL exists:

- 6 ug/l (ppb) for cobalt
- 40 ug/l (ppb) for lithium
- 100 ug/l (ppb) for molybdenum

EPA also adopted an “alternative” GWPS for lead of 15 ug/l (ppb). EPA stated that it derived these values using the same methodology EPA requires states to use in establishing alternative GWPS and referencing the Risk Assessment for Superfund Guidance document.

MODIFICATION OF GROUNDWATER MONITORING REQUIREMENTS

The 2015 Coal Ash Rule requires all CCR units, without exception, to comply with identical groundwater monitoring and corrective action requirements. According to EPA, however, some hydrogeologic settings preclude migration of hazardous substances from CCR impoundments to groundwater. Requiring monitoring in those settings would provide little or no additional protection for human health or the environment.

This modification is only available in states with EPA-approved alternative CCR permitting plans under the WIIN Act. It allows the participating state's director to suspend groundwater monitoring requirements if the owner or operator of the CCR impoundment can demonstrate that there is no potential for migration of any CCR constituents from the CCR impoundment to the uppermost aquifer during the life of the unit, during closure, or during post-closure care. The demonstration must be certified by a Professional Engineer approved by the participating state's director. EPA's rationale for this modification is that it allows for site-specific flexibility and prevents burdensome and unnecessary monitoring requirements at sites where migration of constituents to groundwater is not possible.

ALLOWING STATE DIRECTORS TO ISSUE CERTIFICATIONS IN LIEU OF A PROFESSIONAL ENGINEER

The current regulations require owners and operators of CCR impoundments to make numerous technical demonstrations and to have those demonstrations certified by a Professional Engineer. The rationale for the original rule was that third-party certifications provided critical support that the Coal Ash Rule would achieve through a consistent statutory standard and would also provide EPA with a degree of control over a facility's discretion in implementing the Coal Ash Rule.

According to EPA, however, the WIIN Act changed the situation by allowing states to exercise oversight under an approved permit program. To reflect the state's authority, EPA determined that it would be acceptable for the director in a state with an approved permit program to certify that the relevant criteria had been met. EPA stated that it was confident that revising the regulation to allow approval from a participating state's director would be at least as protective as the status quo under the existing regulations.

CONCLUSION

The modifications published on July 17, 2018 became effective on August 16, 2018. In a statement accompanying the release of the modifications, EPA interim Director Andrew Wheeler asserted that "our actions mark a significant

departure from the one-size-fits-all policies of the past and will save tens of millions of dollars in regulatory costs.” Environmental groups, however, including Earthjustice and the Environmental Integrity Project, have described the changes as an “indefensible gutting of our nation’s first-ever coal ash pollution control rule.” It is likely that one or more environmental groups will file lawsuits to challenge these rule changes.