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10 Topics For Corporate Counsel To Consider On Coal Ash

Law360, New York (April 20, 2015, 4:17 PM ET) --

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The U.S. Environmental Protection Agency has adopted extensive new regulations for the disposal of coal combustion residuals as a solid waste under Subtitle D of the Resource Conservation and Recovery Act. The final CCR rule, signed by EPA Administrator Gina McCarthy on Dec. 19, 2014, will take effect on Oct. 14, 2015. 80 Fed. Reg. 21302 (April 17, 2015).

The publication starts the clock running on self-implementing obligations for owners and operators of certain CCR landfills and surface impoundments, including phased-in location restrictions, liner design criteria, structural integrity rules, operating criteria, groundwater monitoring and corrective action, closure planning and post-closure care requirements, and recordkeeping, notification and reporting duties. The rule imposes various compliance deadlines beginning on either Oct. 14 or Oct. 19.

The rule is the first of its kind under the RCRA Subtitle D's unique enforcement structure, which grants enforcement authority to states and citizens rather than to the EPA. The rule also requires owners and operators of CCR units to post compliance data on a publicly accessible website, which creates novel litigation risks that may not be immediately obvious to environmental, safety and health professionals. To guide in-house counsel in evaluating and addressing those new risks, we have compiled a list of the top 10 points in-house counsel should know about the coal ash rule.

1. The EPA Cannot Enforce the Rule

One of the aspects of the new regulatory regime gathering the most attention and controversy is the EPA's decision to proceed under the RCRA's Subtitle D. Rather than place enforcement authority in federal hands, the subtitle establishes a framework for federal, state and local cooperation under which the EPA can establish minimum federal criteria and offer technical guidance, but cannot actually enforce those criteria. See RCRA Section 4001.

That is, the RCRA provisions that give the EPA authority to promulgate the CCR rule — RCRA Sections 1008(a) (minimum criteria to define open dumping), 4004(a) (criteria to distinguish sanitary landfills and open dumps) and 4005(a) (closing or upgrading of open dumps) — do not give the EPA any

corresponding authority to enforce the rule. As the EPA explained in proposing the rule, the "EPA has **no role** in the planning and direct implementation of solid waste programs under RCRA [S]ubtitle D." 75 Fed. Reg. 35128, 35136 (June 21, 2010) (emphasis added); accord 80 Fed. Reg. at 21310 ("EPA has no role in the planning and direct implementation of the minimum national criteria ... under RCRA subtitle D, and has no authority to enforce the criteria.").

2. States Can Enforce the Rule By Revising Their Solid Waste Management Plans

States may enforce the rule under Subtitle D by revising their solid waste management plans to incorporate the new CCR disposal requirements. To revise their plans, states would need to follow their own rule-making procedures, which likely include approval by state legislatures. States also would need to submit any revisions to the EPA for approval and public comment. See RCRA Sections 1008, 4002, 4003 and 4007; 40 C.F.R. Part 256. Revision of state plans is entirely optional; the EPA encourages states to revise their SWMPs to enforce the rule, but cannot require them to do so. 80 Fed. Reg. at 21309, 21310, 21339.

3. The Rule Is Self-Implementing, Giving Citizens and States the Ability to Sue to Enforce the Rule via Citizen Suit Litigation

Regulated entities can be held responsible for noncompliance with the coal ash rule, even if a state does not revise its SWMP to incorporate the rule. In contrast to regulations promulgated under RCRA Subtitle C, which generally become enforceable only after states have incorporated hazardous waste requirements into their own state rules and the EPA has authorized the state provisions, regulations issued under RCRA Subtitle D are self-implementing. See, e.g., 80 Fed. Reg. at 21331-34. The CCR rule's requirements thus are automatically effective whether or not they are ever incorporated into state law. Once the rule becomes effective in October, any person will be able to sue CCR owners or operators to enforce any of the rule's requirements under RCRA's citizen suit provision, Section 7002(a)(1)(A). Such suits will most likely be pursued by environmental nongovernmental groups.

A state also may enforce the rule by bringing an RCRA citizen suit, which will allow a state that has not amended its SWMP to still enforce the rule. Although the concept of a state suing to enforce federal requirements seems counterintuitive, RCRA's citizen suit provision allows "any person," including a state, to commence a civil action against any other person alleged to be in violation of any regulation under Subtitle D, such as the CCR rule.

4. Compliance with State Solid Waste Requirements Will Not Bar a Citizen Suit

Even if a state does incorporate the rule into its SWMP, ENGOs may still sue to enforce the federal criteria. EPA approval of a SWMP does not mean the state plan operates in lieu of the CCR rule. See 80 Fed. Reg. at 21330, 21332-33, 21412. Instead, under the unique structure of Subtitle D, the federal rule remains in place and subject to enforcement through a RCRA citizen suit, even if the state determines that the CCR unit does not violate the state plan. However, the EPA expects compliance with an EPA-approved SWMP will carry "substantial weight" in a court proceeding to determine whether compliance with state requirements constitutes compliance with the federal criteria. Id. at 21334, 21429.

5. To Facilitate Citizen Suits, the EPA Requires Companies Subject to the CCR Rule to Post Compliance Information on the Internet

The EPA has designed the rule to promote citizen enforcement and to minimize the danger CCR unit

owners or operators will take advantage of Subtitle D's self-implementing system. 80 Fed. Reg. at 21427. Because citizens cannot physically inspect CCR units, the rule facilitates citizen enforcement by requiring CCR unit owners or operators to post certain compliance data, such as the facility's fugitive dust control plan, hazard classification assessment and annual groundwater monitoring and corrective action report, on a publicly accessible Internet site. See, e.g., id. at 21335, 21339, 21427.

That site must be called "CCR Rule Compliance Data and Information" and must be up and running six months from April 17. The EPA indicated that failure to comply with the Internet posting requirements will also be enforceable by citizen suit, which may be brought to enforce any standard, regulation, condition or requirement under the RCRA. Id. at 21427; see RCRA Section 7002(a)(1)(A). ENGOs, therefore, will be able to review compliance data online and determine whether a suit is warranted.

6. Citizens Must Satisfy Statutory and Constitutional Requirements Before Bringing Suit to Enforce the Rule

Like citizens suing under other environmental statutes, citizens seeking to enforce the CCR rule must satisfy certain statutory prerequisites and constitutional requirements before bringing suit. ENGOs must be able to tie a CCR unit's compliance failures to an injury to a local plaintiff before bringing suit to satisfy constitutional and prudential standing, ripeness and mootness doctrines.

The RCRA also imposes its own prerequisites to suit, including a notice requirement. Before bringing suit, citizens must issue a notice of intent to sue to the CCR unit owner or operator followed by a 60-day period to allow the owner/operator the opportunity to cure the alleged violation. See RCRA Section 7002(b)(1)(A). Citizen suits also must allege an ongoing violation of the rule and cannot proceed if a state has commenced and is diligently prosecuting a civil action for compliance with the CCR rule. Section 7002(b)(1)(B); see also, e.g., Francisco Sánchez v. Esso Standard Oil Co., 572 F.3d 1, 7-8 (1st Cir. 2009).

7. The EPA Can Still Bring an Imminent Hazard Action

Although the EPA cannot enforce the rule, owners and operators of CCR landfills and surface impoundments could be subject to adverse action by the EPA in the event of an imminent hazard. The EPA can bring action under RCRA Section 7003 if the past or present handling, storage, treatment, transportation or disposal of CCR may present an imminent and substantial endangerment to health or the environment. Violation of the CCR is not per se a basis for an imminent hazard action, but the EPA believes the failure to comply with the rule "increases the probability that an imminent and substantial endangerment may arise[.]" 80 Fed. Reg. at 21335. States and citizens also can bring imminent hazard suits under the RCRA's citizen suit provision, Section 7002(a)(1)(B). Unlike a citizen suit brought to enforce the CCR rule under Section 7002(a)(1)(A), an imminent hazard action can be brought for past violations and a 90-day period to cure the violation is required after issuance of the notice of intent to sue.

8. The Rule's Transparency Requirements Pose Potentially Significant Litigation and Document Management Risks

The CCR rule requires owners or operators to make documents publicly available that could build the case for a potential citizen suit as well as other types of claims against them. For example, owners or operators must post potentially damaging information, such as groundwater monitoring exceedances, classification of a surface impoundment as having high-hazard potential (including potential loss of life

in the event of a structural failure) and fugitive dust complaints. Owners and operators should ensure that their compliance plan incorporates sufficient legal training and oversight to address litigation and document management risks involved in posting documents on the Internet.

9. Vague Definitions and Standards in the Rule Create Regulatory Uncertainty and Litigation Risks

The rule contains vague definitions and standards that create regulatory uncertainty and litigation risks for the regulated industry. For example, it is not clear what qualifies as "an accumulation" of CCR in defining a CCR surface impoundment, what precise number of groundwater monitoring wells will "accurately represent" background groundwater quality, what it means to implement a corrective action remedy for groundwater quality exceedances or correct an identified structural deficiency "as soon as feasible," or what it means to "effectively minimize" airborne CCR. Owners and operators are left to interpret those provisions for themselves, without an authoritative regulatory authority to consult. There are numerous other areas where the rule is vague, which creates regulatory uncertainty and litigation risks in the absence of any legislative fixes or further guidance from the EPA.

10. The Rule Could Create a New Standard of Care in Tort Litigation

Plaintiffs in future tort actions, such as toxic tort, property damage and personal injury cases, could contend that the CCR rule establishes a standard of care. Plaintiffs could then argue that a violation of any of the rule's provisions is negligence per se. Plaintiffs could also cite the rule as evidence that the disposal of CCR is an ultrahazardous activity, giving rise to strict liability claims. The rule's preamble provides potential ammunition for such a claim. For example, the EPA notes its concern with "hazardous" and "toxic" groundwater and dust discharges from CCR facilities and the risk to human life, health and safety in the event of a "catastrophic" surface impoundment structural failure such as the dam failure that occurred in Kingston, Tennessee. See, e.g. 80 Fed. Reg. 21328, 21348, 21361, 21387, 21392. Violation of the rule thus puts CCR owners or operators at risk not just of enforcement action and citizen suits, but of future tort claims as well.

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