

Message

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Sent: 7/20/2017 2:51:32 PM
To: Brown, Byron [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9242d85c7df343d287659f840d730e65-Brown, Byron]; Davis, Patrick [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7fca02d1ec544fbbbd6fb2e7674e06b2-Davis, Patr]
CC: Doug Green [dhgreen@venable.com]
Subject: Follow-up to CCR Rule Discussion

Byron and Patrick,

Thank you again for taking the time to meet with us last Friday to discuss USWAG's petition for reconsideration of the CCR rule, particularly the need for an extension of the rule's outstanding compliance deadlines. As a quick follow-up, I want to reiterate our perspective on a few points raised during the meeting. As an initial point, however, it is critical for EPA to inform the utility sector as soon as possible whether it intends to give a deadline extension because companies are in the midst of making irreversible and major financial and operational decisions to comply with CCR rule criteria that may likely change under EPA-approved state CCR permit programs. A decision by EPA that is made even a month from now may be, as a practical matter, of limited value for many companies that have already made significant operational decisions. Therefore, we would appreciate indication from EPA with respect to whether it will grant USWAG's petition and extend the deadlines *as soon as possible*. We appreciate very much your consideration of this timeline, which simply reflects the realities of the advanced planning and long-term business decisions that companies must make to ensure compliance with applicable regulations.

As we discussed at our meeting, without an extension of deadlines, the rule's groundwater monitoring program will result in the forced closure of unlined surface impoundments and, in some cases, power plants. This forced closure is not based on site-specific risk, but, rather, is regulation of the "lowest common denominator" due to the rule's self-implementing scheme.

Under an approved state permit program authorized under the WIIN Act, such site-specific risk could be taken into account. Therefore, an unlined surface impoundment would not have to close under an EPA-approved state permit program if the state permitting body determined that, based on site-specific factors, the continued operation of the impoundment would not pose a risk to human health or the environment. However, approved state CCR permit programs under the WIIN Act almost certainly will not be in place by July 2018, when CCR units can trip forced closure under the self-implementing federal groundwater monitoring rules. And in some cases, forced closure of a CCR unit will result in the premature closure of the power plant. This is wholly unnecessary and forfeits a key Congressional purpose of the WIIN Act—to allow for site-specific tailoring of the CCR rules through individual CCR permits.

While we appreciate the staff's attempts to address our concerns by suggesting the existing rule can provide the relief needed, that is not the case.

First, the suggestion that there are not many unlined surface impoundments (as that term is defined in the rule) is simply incorrect.

- Owners and operators were required to determine whether or not existing surface impoundments are "unlined" by October 17, 2016.

- Based on information posted to utilities' CCR compliance websites, 310 of the 412 existing impoundments at 149 power plants do not have liners: 75% of impoundments are unlined.
- Thus, the majority of existing CCR surface impoundments could potentially trigger forced closure under the existing rule unless the deadlines are extended to allow for a demonstration under state CCR permit programs that the units can continue to operate in a manner that is protective of health & the environment.
- This will put some of the 149 power plants that utilize these surface impoundments at risk of continued operation.

Further, as we discussed at the meeting, the “off ramps” described in the meeting—the ability of states to extend compliance deadlines and the rule’s alternative closure provisions—would not provide the relief needed.

Regarding possible extension of compliance deadlines by the states:

- This option is only be available in states that have incorporated the CCR rule into their state SWMP, and not many have.
- It is highly unlikely that states will seek both SWMP and WIIN Act approval; they will likely only seek WIIN Act approval.
- In addition, these extensions are only available once a facility is in noncompliance with the rule; for obvious reasons, noncompliance is not a position the utility industry wants to be in.

Regarding alternative closure provisions:

- This option is available only in limited circumstances: EPA has interpreted this “off ramp” to apply only to the continued disposal of CCR in circumstances where there is no alternative disposal capacity for the CCR.
- EPA has narrowly interpreted this provision as not extending to non-CCR process wastewaters, which are inevitably produced at power plants. CCR impoundments at issue serve dual functions—the management of CCR and non-CCR process wastewaters.
- EPA is considering revisions to the alternative closure provisions that would take into account non-CCR wastewaters and the dual function of impoundments through the Remand Rule; however, this rule is scheduled to be final July 2019, which is well after the critical date for CCR impoundments if the current deadlines are maintained.
- Therefore, the alternative closure provision—as currently drafted and interpreted by EPA—is of extremely limited utility and would not provide relief for the majority of forced CCR unit closures under the rule and the threat to continued power plant operation.

Finally, the suggestion that corrective action guidance could provide some relief is not correct, as the rule’s self-implementing groundwater monitoring requirements are enforced through RCRA citizen suits and compliance decisions which will be rendered by federal district courts across the country. One such suit has already been filed and many more are expected after October 17, 2017, when the groundwater monitoring program becomes effective. There is no need for this tremendous waste in litigation resources when these standards are likely to change under state CCR permit programs approved under the WIIN Act.

In sum, without an extension of CCR Rule deadlines, numerous facilities are facing the very real possibility of being forced to close any number of the 310 unlined impoundments, and some of the 149 power plants, without regard to the actual risk posed by those impoundments. This will result in staggering costs for the industry and threaten power reliability in some regions. Citizen suit litigation over when and how to close these units will further exacerbate these threats to power plant operation. Much of this can be avoided by giving time for state CCR programs to be approved and get up and running as contemplated under the WIIN Act.

Please let me know if you have any questions about the above or any other points raised during the meeting.

Jim

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