



IPAA RCRA Subtitle D Actions

The Environmental Protection Agency (EPA) entered into a Consent Decree with the Environmental Integrity Project (EIP), Natural Resources Defense Council (NRDC) and other environmental groups regarding litigation against EPA seeking action to require EPA to act under Subtitle D of the Resource Conservation and Recovery Act (RCRA) with regard to oil and natural gas production wastes in December 2016. While this Consent Decree requires EPA to make decisions no later than March 15, 2019, EPA should determine that it does not need to develop any federal regulations under Subtitle D in 2017.

Background

This latest environmental initiative results from longstanding efforts by environmental groups to regulate oil and natural gas production wastes under RCRA.

It begins with EPA's 1978 RCRA Subtitle C regulations. RCRA's primary regulatory Subtitles are Subtitle C and Subtitle D. Subtitle C regulates hazardous wastes. It is extensive and prescriptive and provides for federal enforcement of programs that are principally delegated to state regulatory agencies. Following EPA's 1978 publication of its regulations, Congress reauthorized RCRA in 1980. As a result of the Bentsen¹ amendment, production wastes are excluded from Subtitle C. The Bentsen amendment required that production wastes cannot be regulated under Subtitle C without an Act of Congress. It further required EPA to undertake a Regulatory Determination addressing three key questions:

1. Whether RCRA Subtitle C was appropriate for production wastes;
2. Whether state regulatory programs were adequately managing the wastes; and,
3. What the impacts would be on American oil and natural gas production if Subtitle C applied.

EPA's 1988 Regulatory Determination concluded that Subtitle C was inappropriate for regulating production wastes, that state programs were adequately managing the wastes, and that Subtitle C regulation of production wastes would severely damage American oil and natural gas production. EPA further indicated that it would work with states to address gaps in their regulatory programs and would consider possible use of Subtitle D for production wastes. The gap filling process ultimately became the STRONGER state review program. EPA never pursued specific Subtitle D regulations for production wastes although Subtitle D applies to production wastes.

Subtitle D regulates nonhazardous wastes including municipal wastes and industrial wastes with no ability for the federal government to directly regulate; Subtitle D is not a delegated authority like Subtitle C. EPA can withhold state grants but grant funding is insignificant.

Subtitle D frames very general authority for EPA. However, there are some provisions that were used by the environmental groups to trigger the litigation leading to the Consent Decree. These are:

40 CFR, Part 257 – Criteria for Classification of Solid Waste Disposal Facilities and Practices - establishes regulatory standards to satisfy the minimum national performance

¹ Lloyd Bentsen was a US Senator from Texas. Lee Fuller staffed the development of the amendment for Sen. Bentsen. It succeeded as the result of a coordinated effort with the State of Texas, the Interstate Oil Compact Commission, IPAA and API.

criteria for sanitary landfills. These criteria established standards for determining whether solid waste disposal facilities and practices may pose adverse effects on human health and the environment. Facilities that fail to meet the criteria are "illegal dumps" for purposes of state solid waste management planning efforts under Subtitle D. *The criteria provide the basis for enforcing the prohibition on "open dumps" and may be used by citizens' suits in Federal District Court.*

40 CFR, Part 256 – **Guidelines for Development and Implementation of State Solid Waste Management Plans** – establish the elements that state solid waste management plans must contain to qualify under RCRA Subtitle D.

EPA has rarely utilized its authority under these sections of RCRA. The most recent action resulted from litigation regarding coal combustion residuals (CCR) where industry preferred a Subtitle D structure to regulation under Subtitle C.

However, each of these sections include requirements that EPA must review its Subtitle D programs every 3 years and determine whether it needs to develop federal regulations and state guidelines or if the current programs, including state regulations, are adequate.

Environmentalists Actions

Following the 1988 Regulatory Determination, environmental groups initiated actions to press for federal regulation of production wastes. Most of these were legislative – bills introduced to repeal the Bentsen amendment. These efforts continue with the most recent being H.R. 2000, introduced by Rep. Cartwright (D-PA). Recent versions of this legislation both repeal the Bentsen amendment and require action under Subtitle D.

In addition to legislative efforts, in 2010, NRDC petitioned EPA to reopen the 1988 Regulatory Determination and reconsider its decision. IPAA developed and submitted extensive rebuttal comments. EPA did not act on the NRDC petition.

After recurring failures to capture production wastes under Subtitle C, environmental groups turned to Subtitle D. In 2016, EIP, NRDC and other environmental groups filed litigation against EPA seeking action to require EPA to act under Subtitle D with regard to production wastes. The environmental groups targeted two issues:

1. EPA statements in its 1988 Regulatory Determination regarding production wastes and RCRA Subtitle D; and,
2. EPA's failure to meet a mandatory RCRA requirement regarding determinations of whether it needs to develop RCRA Subtitle D regulations and state guidelines.

The litigation sought to compel EPA to act. The environmental groups argued that EPA indicated it intended to develop some production wastes regulations under Subtitle D but it had failed to do so. They argued that EPA failed to act on a mandatory duty in RCRA to determine every 3 years if it needs to develop Subtitle D regulations (a general mandate but raised here in the context of production wastes) for 27 years. They argued that EPA has failed to act on a mandatory duty in RCRA to determine every 3 years if it needs to develop Subtitle D state guidelines (a general mandate but raised here in the context of production wastes) for 18 years. The environmental groups asked the court to order EPA to act and to require it to develop Subtitle D production waste regulations.

API and IPAA sought to intervene in the litigation. North Dakota sought to intervene in the litigation. And, TIPRO sought to intervene. All were denied the right to intervene. EPA agreed to a Consent Decree in December 2016. The Consent Decree contains two major requirements.

1. Under the Consent Decree, by March 15, 2019, EPA must propose revisions or determine it does not need to revise criteria regulations for oil and natural gas production wastes under Subtitle D (40 CFR, Part 257).
2. Under the Consent Decree, by March 15, 2019, EPA must propose revisions or determine it does not need to revise state plan guidelines for oil and natural gas production wastes under Subtitle D (40 CFR, Part 256).

Significantly, the Consent Decree does not require EPA to develop regulations and guidelines. Moreover, if EPA develops Subtitle D production waste regulations and state guidelines, it cannot compel states to adopt them. *However, the regulations could open a pathway for citizen suits against individual producers under federal law for failure to comply with the federal regulations even if the producer complied with state regulations.* This is a key objective of the environmental group litigants.

Action Options

The environmental group litigation changes the framework under which industry and states must operate. In finding a pathway to compel EPA action if it fails to meet the 3 year mandatory requirements under Subtitle D, EPA will now need to assert triennially that state regulatory programs effectively manage Subtitle D wastes (specifically with regard to oil and natural gas production wastes). If it does not, it will be vulnerable to repeated litigation.

This reality creates political management issues for states and for industry. For states, it presents a challenge if EPA developed federal standards that conflict with state regulatory programs. Because state programs reflect the unique geographic and geologic conditions within their jurisdiction, a national federal regulation would differ. For industry, it places industry in a position of coping with multiple regulatory requirements. Since EPA has determined that state programs effectively protect the environment, double regulations are unnecessary. It also places industry – which must comply with the state permitting requirements – vulnerable to environmental groups litigating against individual operators for failing to meet federal requirements even when it complies with state requirements.

The solution requires EPA to conclude that the state regulatory programs are protective and no Subtitle D action is necessary. EPA can conclude without a significant effort that it finds state programs to be capable of managing oil and natural gas production wastes and that it does not need to develop federal regulations or state guidelines under Subtitle D. EPA should act in 2017 rather than closer to the 2019 deadline for two reasons. First, delay suggests that action is needed by state programs. Second, by acting in 2017, EPA can reaffirm its decision in 2020 (meeting the 3-year mandate) and establish a pattern of action.

State regulators are best positioned to drive the discussion at EPA but have not shown an active engagement. While North Dakota sought to intervene, other states did not. States need to be contacted and convinced to weigh in with EPA. IPAA has contacted IOGCC, GWPC, Texas, North Dakota and Pennsylvania, but none appear to be responding. States need to hear from their constituents.