CCR Update

Air & Waste Management Association
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• Timeline Issues
• Federal Rulemaking
• Alabama Rule
• Litigation
Timeline Issues
When are CCR deliverables due?

- *Location restrictions:*
  - October 2018

- *Groundwater results:*
  - It’s complicated!
Detection and assessment monitoring:
• Determine statistically significant increase (SSI)
• Alternative source demonstration
  • Not mandatory
• Resample (assessment monitoring only)
At the conclusion of assessment monitoring:

• If SSI confirmed, initiate corrective measures

• Cease sending CCR and initiate closure
  • 6 months – July 15, 2019 (depending…)
EPA letters to USWAG:

• Jan. 26, 2018, and Apr. 30, 2018

• Confirming *sequential* (not concurrent) timeline for each element
Timeline Based on EPA Guidance

Jan. 15, 2018:
• DM – Statistical Analysis

Apr. 16, 2018:
• DM – Alternate Source Demonstration (optional)

July 16, 2018:
• Initiate AM

Oct. 15, 2018:
• Resample / GW Prot. Standard

Jan. 14, 2019:
• AM – Statistical Analysis
  • (Alternate Source Demonstration allowed under the regulations)

Apr. 15, 2019:
• Initiate Corrective Measures

July 14, 2019:
• Cease Receipt & Initiate Closure
Federal Rulemaking
“Remand rule”:
1) Issues on remand from D.C. Circuit
2) Issues associated with WIIN Act
3) Use of CCR during closure
   • Comment period closed April 30, 2018
Issues on remand from the court:
1) Non-GW releases that trigger corrective action
2) Boron on Appendix IV
3) Vegetation management
4) Alternative closure proposal
WIIN Act – background:
• Passed in Dec. 2016
• Mostly a water resources statute
• Authorized EPA to approve state CCR programs
Federal Rulemaking

Why does a state program matter?

• Before the WIIN Act, EPA and states lacked direct authority under RCRA Subtitle D

• Because of that lack of direct regulatory oversight—
  • EPA’s CCR rule included conservative requirements
  • Did not include certain “flexibilities” (risk-based standards and responses) included in municipal solid waste landfill (MSWLF) regulations for decades
WIIN Act issues:
• “Flexibilities” adapted directly from Part 258 MSWLF regulations
  • Alternative GW protection standard if no MCL, modify corrective action requirements, etc.
• EPA also solicited comment on rule deadlines
Use of CCR during closure:

• Whether and how to use CCR to support construction of cover systems

• Generally cannot place CCR in unit 6 months after closure is triggered
Alabama Rule
• Alabama Environmental Management Commission recently adopted
  • Adopted: April 20, 2018
  • Effective date: June 5, 2018
Content:
• Largely consistent with EPA CCR rule
• Included certain “flexibilities” subject to EPA approval
• Other state-only provisions
  • Buffer, operational requirements, etc.
• Also: Boron on Appendix IV (Assessment Monitoring)
Significant procedural differences:

• Permit program
  • Applications due 180 days (Dec. 3, 2018)
• Permits subject to public notice, opportunity to request hearing, etc.
• Variance authority
Industry perspective on ADEM’s rule:

• A permitting program improves regulatory certainty

• Better to sort through complex technical issues at agency compared to litigation
Litigation
Clean Water Act cases ongoing:

• Substance of claims:
  • “Hydrologic connection” theory

• Status:
  • Numerous trial cases and appeals pending
Hydrologic connection theory:
• CWA regulates “point source” discharges to surface waters (rivers, streams, wetlands, etc.)
  • Discharges to groundwater not regulated as such
  • But what if flow continues to surface water and acts as a “conduit” of pollutants?
• EPA statements and cases are mixed
Litigation

Status of cases:

• Ninth and Fourth Circuits:
  • Established CWA coverage

• Appeals pending:
  • Second, Fourth, Sixth Circuits

• Numerous trial court cases pending
RCRA citizen suits:
• Minor impacts thus far
• Closure plan lawsuits in N.C. dismissed on procedural grounds (ripeness, standing)
• Suits will become more likely as more CCR deliverables are posted
“Diligent prosecution” argument:
• Federal environmental statutes say:
  • A citizen suit is not available if the state is diligently prosecuting the same claim
• Has been an issue in CWA cases
• Can be an issue for RCRA cases, in a state that adopts CCR rules and pursues enforcement
Common law claims:

- Trespass, negligence, personal injury, etc.
- Not a huge impact thus far
  - But some worker safety cases have proceeded:
    - Jacobs Engineering (TVA Kingston cleanup)
    - AEP Gavin Landfill
Questions?

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