

Recent Changes to EPA Coal Ash Regulations' Regulatory and Insurance Coverage Implications

August 29, 2018 Barry Buchman, Adrian Azer

PRACTICES Energy, Power and Natural Resources, Environmental, Insurance Recovery

A new rule promulgated by the U.S. Environmental Protection Agency (“EPA”) governing the disposal of coal combustion residuals, also known as CCR or coal ash, raises the risk for civil claims and the need for insurance to cover them.¹ The rule, which takes effect Aug. 29, 2018, revises regulations issued in 2015 and has the stated intent of providing utilities and states “more flexibility in how CCR is managed.”² Although the revised regulations provide utilities significant benefits with regard to the processes and procedures required to manage coal ash, businesses may still be faced with enforcement actions and civil claims, including those brought by environmentalist groups under the citizen suit provisions of the Resource Conservation and Recovery Act (“RCRA”). Companies should ensure that they understand their existing and historical insurance policies and also that they have appropriate insurance in place going-forward to provide coverage if claims arise. This coverage may be available for a variety of environmental claims brought by citizen groups and is not limited to the coal-ash rule.

This alert addresses (1) the changes to the 2015 rules; (2) potential civil claims that may arise due to the regulatory changes; and (3) the potential availability of insurance coverage to protect utilities from the impact of such civil claims.

I. Overview of the EPA’s Revisions to the 2015 Regulations

Coal ash is an industrial waste created when coal is burned to produce electricity. The EPA promulgated rules regarding its disposal in 2015 in the wake of two disastrous events: a 2008 dam breach at the Tennessee Valley Authority's Kingston power plant that leaked over a billion gallons of coal ash, and a 2014 pipe breach at Duke Energy’s Dan River steam station that leaked nearly 40,000 tons of coal ash.

In response to industry concerns, the EPA finalized its first set of revisions to the 2015 rules on July 18, 2018. The revised rules:

- Provide states that have approved coal ash permit programs authority to use alternative performance standards³
- Revise the groundwater protection standard for coal ash constituents that do not have an established drinking water standard
- Provide facilities facing closure under the regulations additional time to stop receiving waste and to initiate closure⁴

Environmental activists have decried the 2018 rule amendments as an “indefensible gutting of our nation’s first-ever coal ash pollution control rule” that “opens the door for weakened monitoring and

cleanup standards”⁵

II. Potential Civil Claims Related to Coal Ash

Although the 2018 rule amendments are generally industry-friendly, their promulgation does not mean that coal ash facilities can let down their guard. Catastrophic events, like those at the Kingston power plant and Dan River steam station, will attract state regulatory attention, and activists have shown themselves willing and able to fund lawsuits. Moreover, the law provides activist groups with several avenues to bring cases against coal ash disposal facilities. For instance, RCRA allows for citizen suits to enforce its standards, and the Fourth Circuit and Sixth Circuit are deciding whether to join the Ninth Circuit in finding that indirect discharges of coal ash through groundwater to the navigable waters of the United States are violations of the Clean Water Act. Similarly, common law nuisance claims can serve as useful vehicles for environmental lawsuits.

III. Insurance Coverage for Potential Civil Claims Related to Coal Ash

As noted, with the EPA’s easing of regulations, there is risk that environmental groups will take a more active role in pursuing civil claims for environmental contamination resulting from coal ash. Indeed, prior to the July 2018 revisions, environmental groups were actively pursuing companies to remediate disposal sites, address alleged groundwater contamination, remediate purported natural resource damages (“NRD”), and establish monitoring and sampling processes. This trend likely will increase with the EPA revisions.

Given this potential increase in suits and, correspondingly, potential liability, companies proactively should address their commercial insurance program to ensure that they can secure coverage to defray potential litigation costs and liabilities.

Commercial general liability (“CGL”) insurance policies and environmental liability insurance policies typically provide coverage for environmental contamination claims. Each of these policies may provide coverage for “property damage” claims, such as groundwater contamination, and certain of these policies may also provide coverage for bodily injury claims. Whether coverage is available may be subject to several coverage issues, including but not limited to:

- **Trigger of coverage and the pollution exclusion:** Environmental contamination, including as a result of coal ash, typically occurs over a long period of time. This is critical when evaluating insurance coverage as historic insurance policies typically provide broader coverage for such claims; for example, some older policies have only the “sudden and accidental,” as opposed to “absolute,” pollution exclusion and other, even-older policies do not contain any pollution exclusion. Thus, when evaluating available insurance, the most expansive view as to when environmental contamination may have begun is the most beneficial approach.
- **After-acquired property:** To the extent that companies acquire properties/sites that have coal ash issues, the acquirer’s insurance portfolio may cover contamination that pre-dated the purchase. Indeed, in *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 130 (Wash. 2000), the Washington Supreme Court held that “coverage is provided under a [comprehensive general liability] policy if the damage occurred within the policy period, but the insured purchased the property after the policy period.” (quoting *In re K F Dairies, Inc. & Affiliates*, 224 F.3d 922, 925 (9th Cir. 2000)).

- **Prior settlements with insurers:** Insurers may contend that prior settlements related to coverage for CERCLA-related clean-up costs released coverage for more-recent environmental lawsuits, such as NRD claims, referenced above. However, many of these prior coverage settlements carve out claims such as NRD claims. Companies should not assume that they do not have any coverage for claims related to coal ash simply because they entered into prior environmental coverage settlements.

Thus, companies should evaluate their coverage in light of the potential for increased claims and, when doing so, they should pay attention to historic policies that may provide coverage for such claims. More specifically, companies should take the following steps to put themselves in the best position to maximize coverage should the need for coverage arise:

- Collect, organize and safeguard all of the company's policies, going as far back in time as possible
- Collect, review, and analyze any prior insurance coverage settlements encompassing these policies to determine whether any of those agreements may have released coverage
- If served with a claim, give notice promptly to all potentially-relevant insurers, absent relatively rare, case-specific circumstances that may justify refraining from giving such notice
- Keep insurers apprised of the status of any claims while also preserving arguments as to the availability or scope of coverage; this is true even when an insurer has agreed to defend the company under a reservation of rights
- Establish and adhere to protocols for internal and external communications, *e.g.*, with insurance brokers, regarding any claims and/or related insurance coverage issues in order to, among other things, preserve applicable privileges; doing so will reduce the risk of insurers citing early statements of company employees or brokers, *e.g.*, about the cause or nature of alleged damage, in a later coverage dispute should one arise

A company's insurance policies can be a very valuable corporate asset. Companies can maximize the value of that asset by addressing it proactively now rather than waiting until a "storm" arrives.

¹ 83 Fed. Reg. 36,435, 36,435 (July 30, 2018).

² News Release, U.S. Environmental Protection Agency, [EPA Finalizes First Amendments to the Coal Ash Disposal Regulations Providing Flexibilities for States and \\$30M in Annual Cost Savings](#) (July 18, 2018). On August 21, 2018, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion vacating parts of the 2015 rule for being too lenient, finding that EPA acted arbitrarily and capriciously and contrary to statutory requirements by "failing to require the closure of unlined surface impoundments, in classifying so-called 'clay-lined' impoundments as lined, and in exempting inactive surface impoundments at inactive power plants from regulation." *Utility Solid Waste Activities Grp. v. EPA*, No. 15-1219, 5-1221, 15-1222, 15-1223, 15-1227, 15-1228, 15-1229, 2018 WL 4000476, at *26 (D.C. Cir. Aug. 21, 2018). Environmental groups are almost certain to challenge the 2018 rule, as well.

³ The new rules allow two types of alternative performance standards. One allows a state director (of a state with an approved coal ash permit program) or EPA (in states that do not have an approved coal ash permit program) to suspend groundwater monitoring requirements if there is evidence that there is no potential for migration of hazardous constituents to the uppermost aquifer

during the active life of the unit and post closure care. The other allows issuance of technical certifications in lieu of a professional engineer.

⁴ EPA extended the closure deadline in two situations. One is where the facility has detected a statistically significant increase above a groundwater protection standard from an unlined surface impoundment. The other is where the unit is unable to comply with the location restriction regarding placement above the uppermost aquifer.

⁵ Press Release, Earthjustice, [Trump Administration's New Rule Weakens Toxic Coal Ash Pollution Safeguards: EPA announcement puts people at increased risk to cancer, heart disease, stroke, brain damage](#) (July 18, 2018).