

# PREPARING FOR THREATENED CITIZEN SUIT URGING MORE REGULATION OF EXPLORATION AND PRODUCTION WASTES

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# TOPICS

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- History and background
- Potential Implications for Regulation of E&P Wastes
- Statute and environmental group claims
- Coal ash citizen suit is the model
- Potential next steps

# HISTORY AND BACKGROUND

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- Resource Conservation and Recovery Act (RCRA)
  - Subtitle C – Hazardous Waste (cradle-to-grave)
  - Subtitle D – Non-hazardous Waste (disposal technical criteria and state guidance)
  - Bentsen (1980) amendments – conditionally exempt E&P wastes pending report and EPA determination
  - 1988 EPA determines E&P waste not subject to Subtitle C
  - Exemption did not include Subtitle D
  - EPA indicated potential need for revisions to Subtitle D for E&P wastes
  - August 2015 – environmental coalition threatened to sue EPA under RCRA

# POTENTIAL IMPLICATIONS FOR REGULATION OF E&P WASTES

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- EPA could attempt to regulate E&P Waste as a hazardous waste under Subtitle C
  - More stringent standards implemented through permits and enforced by EPA
  - Likely could not do this unless EPA conducts another study, reports to Congress, determines hazardous waste regulation is needed, promulgates Subtitle C rules, and rules are approved by an Act of Congress
- EPA could re-interpret and narrow the scope of which E&P wastes are exempted.

# POTENTIAL IMPLICATIONS FOR REGULATION OF E&P WASTES (Cont'd)

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- EPA could promulgate extensive and stringent Subtitle D minimum criteria and guidelines
  - State programs would have to meet the minimum criteria, and could be broader and more stringent
  - EPA has few tools to require states to meet minimum criteria
  - May result in some states shifting their regulation of E&P wastes from oil and gas commission to solid waste division of environmental agency
  - States could issue permits or otherwise require compliance, and enforce
  - Environmental or community groups could enforce through citizens suits

# ENVIRONMENTAL GROUPS HAVE TARGETED THE FOLLOWING WASTES:

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- Drill cuttings
  - Concerns based on chemicals used in drilling fluids and chemicals present in formation, including TENORM and NORM
- Drilling muds
  - Concerns based on compounds such as barite in muds
- Wastewater
  - Concerns regarding flowback from completions and produced water during production
  - Concerns regarding conventional pollutants (TDS, etc.), metals and radioactive materials
- Fracturing Sand
  - Concerns about silica sands treated with chemicals

# ENVIRONMENTAL GROUPS HAVE TARGETED TYPES OF DISPOSAL METHODS:

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- Dust suppression/road spreading
- Land application/irrigation
- Open-air wastewater impoundments
- Injection wells
- Pits

# POTENTIAL SUBSTANTIVE AREAS OF REGULATION

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- Siting requirements (location restrictions)
- Enhanced groundwater monitoring (up and downgradient wells)
- Seismic monitoring and restrictions
- Enhanced corrective action based on monitoring
- Specific closure/post-closure requirements
- Regulation of liners and leachate collection
  - Includes development of specific design criteria (primary, secondary liners and relevant thickness) and structural integrity
- Operating Criteria
  - Enhanced dust controls
  - Run-on/run-off controls
  - Inflow flood control
- Increased and routine inspections



# CITIZEN SUIT

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- RCRA 7002(a)(2)

*“Any person [or group] may commence a civil action ... against the Administrator where there is an alleged failure of the Administrator to perform any act...that is not discretionary.”*

# ALLEGED EPA FAILURES

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- RCRA 2002(b)

*“Each regulation promulgated under this chapter shall be reviewed, and where necessary, revised not less frequently than every three years.”*

- 40 CFR Part 257 “open dump” Subtitle D nonhazardous rules regarding disposal of wastes from oil, natural gas and geothermal exploration, development and production (E&P wastes)
- 40 CFR 261.4(b)5 rule exempting E&P wastes from Subtitle C hazardous waste regulation

# ALLEGED EPA FAILURES (Cont'd)

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- RCRA 4002(b)

*“Such [state plan] guidelines shall be reviewed ... not less frequently than every three years, and revised as may be appropriate.”*

- *40 CFR Part 256 guidelines to assist states in the development and implementation of their solid waste plans*

# CITIZEN SUIT PROCEDURES

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- 60 day notice before commencing suit.
- Will be in U.S. District Court for DC.
- Court will only order EPA to perform the act it has failed to perform by a certain deadline. Will not specify how EPA is to perform the act.
- Attorneys fees and other costs may be awarded to prevailing or substantially prevailing party
- Any person or association may intervene as a matter of right
  - Where disposition of suit may impair its ability to protect its members' interests
  - Unless it is shown that the intervenor's interests are adequately represented by an existing party
  - May also have to show independent standing

# COAL ASH CITIZEN SUIT IS MODEL FOR E&P CITIZEN SUIT

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- EPA had proposed in 2010 to regulate disposal of coal combustion residuals (CCR) alternatively under Subtitle D nonhazardous rules or under Subtitle C hazardous waste rules
- 11 Enviro groups, including Environmental Integrity Project, brought citizen suit against EPA for failing to conduct the RCRA 2002(b) review within three years of:
  - 40 CFR Part 257 “open dump” Subtitle D rules relative to disposal of CCR
  - 40 CFR 261.4(b)(4) rule exempting CCR from Subtitle C hazardous waste regulation
  - 40 CFR 261.24 TCLP

# COAL ASH CITIZEN SUIT IS MODEL (Cont'd)

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- Largest US marketer of beneficially used CCR, wanted:
  - EPA to complete its rulemaking soon
  - Subtitle D regulation
  - No “sweetheart” settlement between Enviros and EPA
- Sued to establish a deadline for EPA to complete its Subtitle D rulemaking
- Utilities intervened in support of EPA

# COAL ASH CITIZEN SUIT IS MODEL (Cont'd)

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- Numerous jurisdictional/procedural challenges
- Court upheld only the Enviro/Marketers' Part 257 Subtitle D count. See Memorandum Order in Appalachian Voices v. EPA, No. 12-0523 (D.D.C., 10/29/2013) (J. Reggie Walton)
- Parties agreed to 12/19/14 deadline for EPA to complete its review and revision of Part 257 Subtitle D or Subtitle C rules.
- EPA decided not to regulate CCR under Subtitle C and issued upgraded Subtitle D standards for CCR disposal
- CCR impoundments and landfills must now meet upgraded standards for:
  - siting
  - groundwater monitoring
  - corrective action
  - closure/post closure
  - structural integrity
  - liners and leachate collection
  - inspections
  - inflow controls

# EXPECTED CLAIMS AND DEFENSES

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## For Part 256 State Plan Guidelines

- Part 256 guidelines regarding how states develop their nonhazardous waste management program are not specific to E&P wastes
- Enviros arguably lack standing for this claim because review and revision of Part 256 guidelines will not likely redress the harm allegedly resulting from under-regulation of E&P wastes



# EXPECTED CLAIMS AND DEFENSES

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## For 261.4(b)(5) Subtitle C Exemption Rule

- 40 CFR 261.4(b)(5) exemption codifies a RCRA 3001(b)(2)(A) statutory requirement that E&P waste be exempted from Subtitle C regulations unless EPA conducts a study, reports to Congress, issues a determination that Subtitle C regulation is warranted, adopts Subtitle C rules for E&P waste, and rules are authorized by Act of Congress.
- General 2002(b) review and revise requirement likely will not override/apply to this special EPA procedure.

# EXPECTED CLAIMS AND DEFENSES

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## For Part 257 Open Dump Rule

- No good jurisdictional defenses
- May have good statutory arguments:
  - Statute says E&P wastes “*shall be subject to existing State and Federal regulatory programs in lieu of [Subtitle C] until*” after study, report to Congress, etc.
  - Has EPA completed a review in last three years (e.g., 2013-2014 state regulatory review)?
  - Could EPA conduct a quick, cursory review of the Part 257 rules outside of a rulemaking, issue a determination not to revise them at this time, and successfully argue that that process meets 2002(b) requirement to review and revise as necessary within 3 years?

# POTENTIAL NEXT STEPS

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- Confer with EPA on how it plans to respond
  - Unlike CCR, EPA has no proposed rule to finalize
  - Encourage EPA not to let Enviro groups use RCRA 2002(b) to dictate the RCRA agenda and how EPA's resources must be used for E&P waste and other RCRA rules
  - Point out that RCRA statute says “*existing regulatory programs*” apply until study, report to Congress, etc.
- Will EPA concede that it must review the Part 257 rules and determine whether they need revision?
  - Potential for EPA, outside of a rulemaking, to conduct a quick review and issue a decision not to revise at this time, and contend this meets 2002(b) review and revise requirement
  - If EPA is intent on considering revisions, suggest an extended deadline

# POTENTIAL NEXT STEPS (Cont'd)

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- Confer with other stakeholders who may advocate for no or limited additional federal regulation of E&P wastes
  - States
- Develop a legislative strategy
- Prepare for intervention
  - Motion, memorandum in support, affidavit, answer to complaint

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