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Daily News

New CWA Deals Highlight Advocates' Bid To Raise Bar For Power Plant ELG

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New Clean Water Act (CWA) settlements between environmentalists and the power industry highlight the groups' strategy of stepping up lawsuits against coal-fired power plants to force broader use of more protective waste treatment technology, part of their effort to demonstrate the feasibility of strict controls that they hope will set a bar for EPA's long-awaited rule governing power plant effluent.

[The new settlements](#), proposed Aug. 1, are part of a wide-ranging push by environmentalists to strengthen the agency's pending power plant effluent limitation guideline (ELG), which they charge is too weak as proposed. They are also seeking to strengthen the ELG because it has emerged as a backstop against EPA's likely decision to finalize a separate but related rule regulating coal ash as a "solid waste" under the Resource Conservation & Recovery Act (RCRA) -- a less stringent option than the "hazardous waste" designation environmentalists have urged.

"The whole idea of these cases is to illustrate the need for both the ELG and the coal ash rule," says an environmentalist attorney.

Sierra Club and other environmentalist groups proposed the most recent settlement agreements Aug. 1 in two separate suits against four Appalachian power companies that would require more protective waste management techniques at the power plants.

The consent decrees in *Sierra Club, et al. v. Appalachian Power Company, et al.* and *Sierra Club, et al. v. Ohio Power Company, et al.* include [more stringent limits](#) on selenium discharges and [a deadline](#) to transition from wet storage impoundments -- which the groups argue are likely to leak -- to dry storage.

The settlements are important because EPA is required by the water law and its regulations to take stock of waste treatment technology in use by the power sector when it calculates the ELG's "best practicable technology currently available" (BPT) mandate.

"Having more power companies with better technology raises the bar for the ELG," the attorney says.

In particular, the emphasis on dry storage is part of a push by Sierra Club and other environmentalists to convince EPA to remove provisions in the proposed ELG that allow continued use of wet storage impoundments for some waste streams covered by the rule, among other exemptions to its treatment requirements.

"There's no technological practicability issue with storing ash dry as opposed to wet. It's absolutely feasible, and we know that it's better from a selenium standpoint. Settlements like these are a demonstration that incrementally better practices are available. They can be implemented and they should be," says a source at Sierra Club.

ELG Proposal

EPA's ELG proposal would update the 1982 effluent guideline for the power sector to include liquid discharges that have become more toxic in recent years as plants are installing equipment, such as scrubbers, to meet new air regulations. EPA and environmentalists recently agreed to a consent decree giving the agency until Sept. 30, 2015, to issue the final effluent rule.

But environmentalists object to the inclusion of three technology-based options added to the rule during White House review, and are seeking to strengthen the regulation either before EPA finalizes it or through litigation after promulgation.

Along with their focus on adopting more protective treatment technologies, the environmentalist groups are seeking to require dischargers to perform new studies of whether their discharges are causing "biological harm" in receiving waters, even after they implement new treatment technologies to meet current effluent limits.

If the studies show harms even after the facilities reduce their discharges, the attorney says, it would strengthen environmentalists' arguments for more stringent effluent limits across the board.

"Even if they're meeting their permit limits, they can still be causing harms to the environment. And if the study shows that there's biological harm occurring within the current limits, it helps us push for new limits," the attorney says.

And those new limits could include broader adoption of standards for waterbodies' conductivity -- a measure of salinity pollution stemming from mountaintop mining and other industrial activity -- after [a June 4 ruling](#) by the U.S. District Court for the Southern District of West Virginia in *Ohio Valley Environmental Coalition (OVEC), et al. v. Elk Run Coal Company* held for the first time that excessive levels of conductivity harms streams.

"The biological study is really designed to key into that line of litigation and give us some substantiation," the attorney says.

Pending Litigation

The Appalachian suits are in addition to pending cases in Tennessee, West Virginia and elsewhere that also seek to require more stringent discharge limits for coal waste.

The CWA suits come as environmentalist groups, including Sierra Club, are pursuing litigation against EPA and other federal agencies that they hope will allow them to mount a challenge to the ELG itself if EPA finalizes the rule without making it more stringent and removing exemptions.

The groups are mounting Freedom of Information Act (FOIA) [suits against EPA](#), the Small Business Association and the White House Office of Management and Budget, hoping to obtain documents they believe will show the administration weakened EPA's proposed utility effluent rule following industry pressure and bolster a likely suit over the rule if the agency finalizes it as proposed.

The administration is arguing that the material sought by the advocates is protected from disclosure under FOIA exemptions, and the environmentalists will have to clear that hurdle if their legal bid to force the release of the data is to succeed. But if advocates win their case, it could lead to the release of hundreds of pages of technical and administrative data on the development and pre-release review of the proposed power plant ELG. -- *David LaRoss* (dlaross@iwppnews.com *This e-mail address is being protected from spambots. You need JavaScript enabled to view it*)

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