CCR Permit Program

Discussion at ASTSWMO Midyear Meeting
April 26, 2017

Agenda

- Water Infrastructure Improvements for the Nation (WIIN) Act – December 2016
- EPA's Current Thinking:
  - State Permit Program Approval Process
  - Flexibilities in State Programs
- Discussion

WIIN Act – Key Elements

- Section 2301 of Water Infrastructure Improvements for the Nation (WIIN), signed by President on 12/16/16. Amends Section 4005 of RCRA.
- Allows for states to submit a CCR permit program to EPA for approval. The program must be "at least as protective as" the CCR rule.
- EPA may grant partial program approvals.
- Once approved, the state permit program operates "in lieu" of the federal CCR rule.
- The CCR rule applies to a CCR unit until a permit is in effect for that unit.
- Review of State programs – at least every 12 years or in specific circumstances

WIIN Act – Key Elements (continued)

- In "non-participating states,"(i.e., a state that does not have an approved permit program) EPA must implement a permit program, *subject to the availability of appropriations specifically provided to carry out a program in a non-participating state*.
- EPA must implement a permit program in Indian Country.
- EPA may use its information gathering and enforcement authorities under 3007 and 3008 to enforce the CCR rule (now) or permit provisions (if a permit is granted under an approved state program or an EPA permit).

EPA's Current Thinking – State Permit Program Approval Process

- Key Points:
  - Communicate early and often with EPA.
  - Need to have regulations in place prior to submitting application for approval of a permit program.
  - EPA must find that a state program is "at least as protective as" the federal CCR rule in part 257; States need to submit evidence for EPA to make that finding.
  - EPA approval of a state program is a final agency action subject to challenge.
  - If the State regulations incorporate the CCR rules in Part 257 by reference, then this does not provide for " flexibilities" or changes from the Part 257 rules.
  - EPA has 180 days from receiving a complete application to make a final decision on the permit program; EPA plans to determine whether permit program application is complete within 30 days of receipt.

EPA's Current Thinking – State Permit Program Approval Process (continued)

- Key Points (continued)
  - Approval Process:
    - EPA's proposed decision on a State program will be published for comment in the Federal Register.
    - EPA will publish its final decision in the Federal Register after reviewing public comment.

EPA's Current Thinking – State Permit Program Approval Process (continued)

Additional Details – EPA's Current Thinking

- Procedures will be based on 239 (rule for permits for MSWLFs).
- Basic Components of a State program application
  - A narrative description of the state permit program
  - A legal certification: can be either from the state Attorney General or an independent legal counsel for the state that has full authority to independently represent the lead state agency in court on all matters pertaining to the state program
  - Copies of all applicable state statutes, regulations, and guidance
  - Completed Part 257 Checklist

EPA's Current Thinking – State Permit Program Approval Process (continued)

- Additional Details – EPA's Current Thinking
- Other elements that we are considering adopting from part 239:
  - Compliance monitoring authority
  - Enforcement authority
  - Public participation
  - Intervention in civil enforcement proceedings
- State Regulations need to be in place prior to applying for a state permit program so that EPA can defend its approval

EPA's Current Thinking – State Permit Program Approval Process (continued)

- Flexibilities
- The statute lays out the standard for approving state programs that differ from the federal regulations (i.e., that incorporate flexibilities) :
  - Statute requires "evidence" that the State program "requires each coal combustion residuals unit located in the State to achieve compliance with…other State criteria that the Administrator, after consultation with the State, determines to be at least as protective as the Federal requirements." Section 4005(d)(1)(B)(ii).
- Key Point: All flexibilities must be "**at least as protective as**" the federal rule as stated in 257
  - Can adopt 257 by reference but then the state is not authorized to grant any flexibilities in individual permits beyond those in the current 257 regulations; or
  - States can propose additional flexibilities. These will need to be identified in the State application/regulations. In order to approve these flexibilities, the statute requires that EPA have factual evidence to support a finding that the state requirements meet the statutory standard—i.e., are "at least as protective as" the federal requirements in 40 CFR part 257 subpart D.

Flexibilities – Review Process

- To help States as they consider developing their programs, EPA has researched existing regulations to determine whether EPA already has enough evidence we could use to support some additional flexibilities
- In our review process:
- Examined the "flexibilities" allowed in Part 258
- Reviewed flexibilities discussed in preambles to Part 257 rules
  - Looked at the basis for those flexibilities
  - Cost is not a rationale that can be used to support approving flexibilities, as the statute does not allow us to consider cost in establishing the part 257 regulations. The part 258 regulations were developed under a different statutory provision, which does allow us to consider cost.

Flexibilities

- These are some examples of the provisions in part 258 that it appears we may have sufficient evidence to support for a CCR permit program.
  - Allow certification by Director of an Approved State rather than PE wherever PE cert is required
  - Suspend groundwater monitoring if the facility can demonstrate no migration
  - Establish risk-based groundwater protection standards if no MCL exists
  - Specify an alternate time to demonstrate compliance with corrective action (versus 3 years)
  - Allow determination that remediation of a release of an App III and IV constituent is not necessary if
    - (1) the ground-water is additionally contaminated from a different source and those substance concentrations are higher than the release such that cleanup of the release from the CCR would provide no significant reduction in risk to actual or potential receptors, or
    - (2) remediation is impracticable, or
    - (3) results in unacceptable cross-media impacts

Flexibilities, continued

- In addition, there are already a number of flexibilities built into part 257 (e.g., extensions to closure schedule, alternative demonstrations with regard to location standards, use of multi-unit groundwater monitoring systems, etc.)
- Again, States can propose additional flexibilities.
- But where the State proposes additional flexibilities, the State would need to provide the evidence to demonstrate that the state requirements are "at least as protective as" the part 257 regulations. EPA doesn't have facts in its possession to support these.
- As a general matter, the more specific and tailored a requested flexibility, the easier it will be to show it is "as protective as" part 257 requirement

Flexibilities, continued

- Flexibilities have to be spelled out in the state regulations that are submitted as part of a permit program.
- If a state currently has regulations that don't include flexibilities (e.g., they have incorporated 257 by reference), and wants to apply for state approval of a permit program, they can do that directly and then add flexibilities at a later time (by modifying their state regulations and submitting a modified permit program for approval).

Flexibilities – Take Away Message

- We really encourage states to come in early in the permit program process so we can help them determine the allowable flexibilities that are as protective as the part 257 regulations.
- This is an evolutionary process and we look forward to working with you on this.

Discussion

- Comments?
- What other tools/assistance can EPA provide?

Example: Groundwater monitoring and corrective action

- CCR Provision: 40 CFR 257.95(h)(2)
- Summary of Provision:
  - As part of the assessment monitoring program, the owner or operator of the CCR unit is required to establish a groundwater protection standard for each constituent listed in Appendix IV to Part 257 (Constituents for Assessment Monitoring) detected in the groundwater.
  - For constituents for which an MCL has <u>not</u> been established, the groundwater protection standard is the background concentration for the constituent established from the wells in the groundwater monitoring system.

Example: Groundwater monitoring and corrective action (continued)

- Potential State program flexibility:
  - A State program could have the option of establishing an alternative groundwater protection standard for constituents without an MCL.
  - The alternative groundwater protection standard would be an appropriate health-based level, based on specific criteria.
  - Under 40 CFR 258.55(i) and (j) for municipal solid waste landfills, the alternative standard needs to be:
    - Consistent with EPA health risk assessment guidelines;
    - Based on scientifically valid studies;
    - For carcinogens, within an excess lifetime cancer risk range of $1x10^{-4}$ to $1x10^{-6}$; and
    - For systemic toxicants (causing effects other than cancer or mutations), a concentration to which the human population could be exposed on a daily basis without appreciable risk of deleterious effects during a lifetime.