IDENTIFYING AND PRESERVING COVERAGE FOR ALLEGED COAL ASH LIABILITY

Date: 20 March 2019

U.S. Insurance Coverage Alert

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Many utilities and other companies that have generated power using coal have historically stored their coal combustion residuals ("CCRs") [1] in coal ash basins or impoundments. A number of companies have faced allegations of environmental property damage resulting from releases of CCRs out of impoundments and into surrounding bodies of water or onto soil, [2] while others have faced allegations of environmental property damage resulting from the leaching of contaminants out of coal ash impoundments into groundwater. Some of these claims have been made under decades-old statutes, such as the Clean Water Act ("CWA") or the Resource Conservation and Recovery Act ("RCRA"). [3] In 2015, the Environmental Protection Agency raised the profile of CCR concerns when it published a final rule, which, among other things, requires groundwater monitoring at coal ash impoundment sites and raises the possibility of requiring remediation of alleged CCR contaminants ("the CCR Rule"). [4]

A recently issued report entitled "Coal's Poisonous Legacy – Groundwater Contaminated by Coal Ash Across the U.S." (the "EIP Report") again directs national attention at CCRs.

EIP REPORT FOCUSES ON CCRS

On March 4, 2019, two environmental groups, the Environmental Integrity Project and Earthjustice, published the EIP Report. That report contains allegations of groundwater contamination at hundreds of coal ash impoundments across the country. [5] In addition to making general allegations regarding groundwater contamination caused by CCRs, the EIP Report includes specific contentions regarding pollutants found in groundwater at particular identified coal ash impoundment sites, including the extent to which the pollutant concentrations exceed safe drinking levels. The EIP Report alleges that unsafe levels of one or more pollutants exist at 254 of the 265 sites mentioned.

Companies that may be connected to any of the sites listed in the EIP Report – whether as owners or operators or as former owners or operators of a site, and/or as contributors of CCRs to a site – may find themselves on the receiving end of claims asserting that they bear liability for alleged environmental damage at these sites. As companies prepare for the possibility of these claims, this Alert offers some practical suggestions for assessing and preserving access to insurance assets that may provide coverage for any resulting defense and indemnity costs.

REVIEW YOUR INSURANCE PROGRAM, INCLUDING HISTORICAL POLICIES

To determine whether it may have coverage for alleged CCR-related liability, a policyholder should review its insurance program, including any historical and current liability policies. Most "occurrence-based" general liability

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policies issued through the mid-1980s provide coverage for property damage that occurred during the policy period, including long-term environmental damage, regardless of when liability is actually asserted. [6] In addition, historical liability policies also often provide coverage for the costs incurred to defend and investigate environmental claims. Many policyholders will find that their single largest potential source of coverage is under general liability policies issued decades ago.

General liability policies, however, are not the only source of potential coverage for alleged environmental damage. First-party property policies may also provide coverage for damage to property owned by the policyholder. Additionally, specialty policies, such as environmental impairment liability or pollution legal liability insurance, may insure some costs associated with alleged environmental property damage. A policyholder should consider all such policies that it may have purchased as potential sources coverage.

All of the foregoing types of policies may provide coverage for CCR-related property damage.

Policyholders often have varying levels of documentation of their historical insurance policies. Given the continuing potential value of these policies, time spent searching for and assembling evidence of a company's historical policies is time well spent. Having documentation of the company's historical insurance program not only allows for an advance assessment of the coverage potentially available, but will allow a policyholder to provide appropriate notices to insurers if and when claims materialize. [7]

DON'T FORGET YOUR PREDECESSORS' INSURANCE POLICIES

Many times, a policyholder will face alleged liability relating not to its own operations, but relating (at least in part) to a predecessor who operated at the same location. That predecessor's insurance program may be a significant source of coverage for alleged CCR liabilities. Accordingly, when assembling and reviewing historical policies, a policyholder should consider whether (i) any predecessors had operations that may be encompassed by the alleged liability, (ii) those predecessors had their own insurance policies, and (iii) the corporate relationship between the policyholder and those predecessors is such that the policyholder may be able to access the predecessor's historical insurance program.

CAREFULLY CONSIDER PROVIDING NOTICE OF ALLEGED CCR LIABILITY

Insurance policies typically require a policyholder to give notice of an occurrence or claim and to cooperate with its insurer in the defense of that claim. Insurers sometimes argue that a policyholder has an obligation to give notice even before receiving a claim if the policyholder is aware of an occurrence that the policyholder reasonably concludes is likely to involve coverage under the policy. Insurers often seek to use allegedly late or defective notice or lack of cooperation as excuses to try to escape their coverage obligations entirely. It is important for a policyholder to comply, to the extent possible, with notice, cooperation, and other conditions in its insurance policies.

In particular, policyholders with coal ash impoundment sites identified in the EIP Report should carefully consider whether the contentions in the EIP Report obligate them to provide notice to their insurers. Even if they do not, it may be prudent for such a policyholder to provide notice out of an abundance of caution. The precise requirements relating to notice and cooperation vary depending upon the language of a policy, and policyholders should review their policies to understand the requirements.

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UNDERSTAND YOUR HISTORICAL OPERATIONS

Insurance companies will often reserve their right to deny coverage for environmental property damage on a number of grounds, including on the purported basis that the policyholder "expected or intended" the property damage for which it is seeking coverage. For a policyholder to rebut that coverage defense, it is imperative that the policyholder thoroughly understand its historical operations and the historical context of those operations. Many activities that are understood today to present a risk to the environment were historically considered proper, and indeed, consistent with best practices during the periods in which they were taken.

Policyholders should also be prepared to respond to other defenses that insurance companies may assert in response to a CCR-related coverage claim. For example, an insurer may argue that a pollution exclusion in its policy applies. The language of pollution exclusions vary widely. As referenced above, some such exclusions may be considered by courts as "absolute." [8]

However, other pollution exclusions are considered "qualified" and only act to deny coverage if certain criteria are met. For example, whether an insurer will be able to escape providing coverage based on a qualified pollution exclusion that contains an exception for "sudden and accidental" releases will depend on the interpretation of that exclusion under the law of the jurisdiction at issue and on the specific facts of the claim. A policyholder may improve its ability to defeat an insurer's pollution exclusion defense by increasing its knowledge of the relevant operations.

ACT PROMPTLY TO IDENTIFY AND SECURE INSURANCE COVERAGE

By understanding their insurance policies and taking the steps outlined above, policyholders may be able to increase their chances of obtaining coverage for any CCR-related claims asserted against them. Policyholders connected to any sites that are identified in the EIP Report, or that might otherwise face CCR-related liability, should act promptly to identify potential sources of coverage, learn about their historical operations and make a determination as to whether it is necessary and appropriate to give notice to their insurers.

NOTES

[1] CCRs are sometimes colloquially referred to as "coal ash," although CCRs may include not only coal ash (which, in turn, encompasses both fly ash and bottom ash), but also coal slag and flue gas desulfurized gypsum.

[2] *See, e.g., In re: Tenn. Valley Auth. Ash Spill Litigation*, No. 3:09-cv-9, 2012 WL 3647704 (E.D. Tenn. Aug. 23, 2012) (finding TVA liable for a CCR spill under theories of negligence, trespass and private nuisance).

[3] Within the past several months, both the Fourth Circuit and the Sixth Circuit Courts of Appeal have issued rulings regarding various theories of liability relating to alleged CCR-related groundwater contamination. *See Sierra Club v. Virginia Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018) (reversing trial court's finding of CCR-related liability because landfill and settling ponds did not constitute "point sources" within the meaning of the CWA); *Tenn. Clean Water Network v. Tenn Valley Auth.*, 905 F.3d 436 (6th Cir. 2018) (reversing trial court's finding of CCR-related liability under CWA because there was no discharge of pollutants into navigable waters); *Ky. Waterways Alliance v. Ky. Utils. Co., 905 F.3d 925* (6th Cir. 2018) (affirming trial court's dismissal of CWA

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claim, but reversing dismissal of RCRA claim relating to alleged CCR contamination of groundwater). Companies should expect plaintiffs to continue to test theories of liability under the CWA, RCRA and the CCR Rule.

[4] *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302 (Apr. 17, 2015) (codified at 40 C.F.R. pts. 257 & 261) (as amended by 80 Fed. Reg. 37988 (July 2, 2015)); *see also Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414 (D.C. Cir. 2018) (addressing challenges to the CCR Rule).

[5] Other contributors to this report include the Prairie Rivers Network, the Sierra Club, Appalachian Voices, and the Natural Resources Defense Council.

[6] Starting in the mid-1980s, most insurance companies inserted so-called "absolute pollution exclusions" in their liability policies. It is difficult in most jurisdictions to obtain coverage under policies containing such an exclusion for pollution-related property damage, although some more recent liability policies provide limited coverage for certain pollution-related damage if various requirements are met.

[7] Insurance archeologists may also be able to assist policyholders in locating evidence of historical policies.

[8] *See, e.g., Headwaters Resources, Inc. v. Ill. Union Ins. Co.*, 770 F.3d 885 (10th Cir. 2014) (applying an absolute pollution exclusion to a CCR-related property damage claim resulting in a denial of coverage).

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