

ENERGY

NEW ENVIRONMENTAL ENFORCEMENT INITIATIVES RAISE CONCERNS

conductivity measure that is so low that it threatens to end most of these operations. By using the term guidance, the EPA avoided the formal rule-making process for adopting regulatory standards; but the agency intends to treat the guidance as equivalent to formal rules when reviewing permit applications.

Compliance

Carbon dioxide (CO₂) is not a regulated pollutant under the Clean Air Act, and the act's legislative history makes it clear that this reflects the intent of Congress. Yet after a 2007 U.S. Supreme Court decision opened the door, the EPA in December 2009 ruled that CO₂ and five other greenhouse gases endanger public health and welfare as defined by Section 202(a) of the act. The endangerment finding itself did not impose any emission reductions, but the EPA plans restrictions on CO₂ emissions from coal-fired power plants to begin to take effect as early as the start of 2011. While the apparent overturn of legislative intent has created animosity in Congress, it is uncertain if any action will be taken before the restrictions are implemented.

If you work for an energy company, you should be concerned about three aggressive regulatory enforcement initiatives that the U.S. Environmental Protection Agency (EPA) has aimed at the coal industry. Each initiative unilaterally uses enforcement action to set new regulatory policy without, or even in contradiction to, a statutory basis.

Permitting

Arch Coal, Inc. underwent a decade-long permitting process to receive approval in 2007 for its Spruce No. 1 mountaintop coal mine in West Virginia. Following detailed review by the U.S. Army Corps of Engineers, state environmental authorities

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and the EPA itself, Arch Coal received regulatory authorization to begin work on the capital-intensive project. But in March 2010, the EPA announced that it intended to revoke the permit, citing concerns over water discharge quality—the first time in its history that the agency has sought to use the Clean Water Act to void a properly permitted project. Simultaneously the EPA said it would review numerous other permits already granted to surface mining operations. Arch Coal has sued the EPA in U.S. District Court for the District of Columbia, contending that a valid permit cannot be arbitrarily canceled.

Rule Making

In April 2010, the EPA issued what it termed “guidance” regarding conductivity, the ability of suspended solids in water to transmit electricity. This guidance targeted the water runoff from coal mining operations in Central Appalachia and proposes a new

The issue for corporate counsel is clear: Advancing policy initiatives through regulatory fiat in one energy segment, if upheld, can be used to target others. In-house counsel should closely follow the legal and legislative challenges to these actions to see if the EPA's new aggressiveness will be allowed to stand.

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The Deepwater Horizon explosion and oil spill in the Gulf of Mexico may expand the already substantial compliance and operational issues facing the energy sector. Aggressive efforts by regulators at the federal and state/provincial levels in the United States and Canada have been increasingly focused on encouraging renewable energy output while tightening restrictions on fossil fuel production and use. Corporate counsel who understand the challenges can realize profitable new opportunities.

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