



Environmental and Industry Groups Challenge EPA Coal Ash Rule

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The news has been full of stories and articles concerning Coal Combustion Residuals (CCR), also referred to as coal ash. CCR became a hot topic in 2008 when a coal ash pond at a utility plant in Tennessee spilled more than 5 million cubic yards of coal ash into a nearby river. The bad news continued in 2014 when a broken pipe under a coal ash pond at Duke Energy's Eden, North Carolina facility allowed an estimated 30,000 cubic yards of coal ash to spill into the Dan River. Dominion Power is now closing its coal ash ponds in Virginia, and there have been public protests and lawsuits associated with how its closures are being completed.

CCR is generated when coal is burned to produce electricity. According to EPA, it is one of the largest industrial waste streams generated in the U.S. Most CCR is in dry form and historically has been placed in on-site landfills or beneficially reused as fill or replacement for raw materials in products like wallboard, concrete and brick. Sometimes, however, CCR is managed in surface impoundments and wet ponds. CCR may contain low levels of mercury, cadmium, and arsenic.

As a result of public pressure to address proper management and disposal of CCR, EPA issued a final waste management rule for CCR in 2015 (the "Rule"). During its years-long rulemaking, EPA offered commenters two options: manage and dispose of CCR as a solid waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA) or manage and dispose of it as a hazardous waste under Subtitle C of RCRA. EPA received over 450 comments and ultimately chose to regulate CCR as a solid waste under Subtitle D. This was a win for the power industry for obvious reasons, and specifically because regulating CCR as a solid waste: (1) imposes much less stringent requirements than management and disposal as a hazardous waste; (2) requires each state to determine if and how it wants to permit CCR disposal; and (3) gives EPA no enforcement authority, leaving enforcement up to the states and citizens groups.

The Rule established requirements for existing and new CCR landfills and surface impoundments, including the following:

- Structural integrity and inspections;
- Groundwater monitoring;
- Corrective action where hazardous constituents in groundwater are above groundwater protection standards;
- Location restrictions;
- Liner design criteria;

- Closure of inactive surface impoundments within three years to avoid additional requirements;
- Day-to-day operating criteria; and
- Recordkeeping, notification and Internet posting.

As expected, environmental groups filed petitions challenging the Rule on the grounds that regulating CCR as a solid waste under Subtitle D is insufficient. A coalition of electric utilities and concrete companies also challenged the Rule, but for other reasons. Among other things, they argue that the Rule's regulation of inactive surface impoundments -- those that no longer receive coal ash -- is unlawful because RCRA does not allow it. A total of seven petitions challenging the Rule have now been consolidated into one case before the United States Court of Appeals for the D.C. Circuit.

Last month, EPA filed its brief in the case and addressed the petitions filed by industry and environmental groups. EPA said it stands by the Rule, arguing it "made well-reasoned judgments based on the data available..." The agency said it "is entitled to considerable deference in making these technical judgments, and...each of the challenged provisions should be upheld because they represent a rational application of EPA's authority and responsibility to regulate CCR in a manner that will protect public health and the environment."

Oral argument has not yet been scheduled. In the meantime, the Rule is in effect, and those subject to it are taking steps to meet its requirements. Many utilities have strict deadlines to manage their existing stockpiles of CCR and to close out or upgrade their existing landfills and surface impoundments. EPA estimates there are approximately 735 impoundments affected by the Rule. That means there is a lot of work to be done to comply.

80 Fed. Reg. 21,302 (Apr. 17, 2015); *Utility Solid Waste Activities Group, et al. v. EPA*, No. 15-219 (D.C. Cir. 2015); *Brief of Respondent EPA*, Doc. #1609241, p. 14 (Apr. 18, 2016).

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