



Crystal-balling the Coal Ash Closure Regulations for the Electric Generation Sector

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On April 17, 2015, EPA issued the final coal combustion residuals (CCR) Rule (the 2015 CCR Rule), providing the first federal regulatory scheme for the disposal of CCR materials. The 2015 CCR Rule regulates only facilities in the electric generation sector. EPA chose to regulate CCR under Subtitle D of the Resource Conservation and Recovery Act (RCRA) as a solid waste. Since 2015, the CCR federal regulatory scheme has been fluid due to ongoing litigation with industry and environmental non-governmental organizations (eNGOs) and subsequent rulemakings tweaking the rule or responding to remands by the court.

EPA recently proposed two regulations that substantially revise the closure regulations for CCR-regulated Units (CCR Units), which are either surface impoundments or landfills that contain CCR material at electric generation facilities. The Closure Part A Rule revises the date when unlined CCR impoundments or those failing the CCR Rule's location restrictions must begin closure by ceasing placing CCR in the impoundment. The Closure Part A Rule also provides extension opportunities for facilities that lack alternate capacity for CCR disposal. EPA also proposed the Closure Part B Rule that offers facilities an opportunity to make a site-specific demonstration that the existing impoundment's liner is sufficiently protective so that there is "no reasonable probability of adverse effects on health or the environment." The Closure Part B Rule is crucial to some facilities because these demonstrations will dictate whether such facilities have to close their impoundments altogether.

The comment period for both proposed rules has now closed. Industry's reception of the concepts proposed by the rules has generally been positive. However, industry commented on rulemaking assumptions, such as how long it takes for some units to obtain alternate capacity for CCR disposal. Alternate capacity hinges on a facility conducting a project to retrofit an impoundment by adding a compliant liner, repowering from coal to natural gas, or converting from a wet coal combustion byproduct handling process to a dry handling process. eNGOs filed comments in opposition to the Closure Part A and B Rules, objecting to EPA granting extensions beyond the CCR Rule closure commencement deadline and opposing the inclusion of a site-specific liner demonstration process.

Looking at the current rulemaking course, the closure regulations for EGUs should be settled in the next six months. Many of the deadlines that EPA has proposed for closure commencement extensions (June 30, 2020) and initial liner demonstration applications (after the Final Rule) will happen in 2020. EPA will also promulgate final closure rules this year. EPA should also have an opportunity to process many of the site-specific closure commencement extension requests in 2020. However, complete liner demonstration packages will not be due until 2021. EPA's review of site-specific technical information to demonstrate that a liner is sufficiently protective will take place in 2021. Only upon completion of that review will those facilities have certainty as to whether the impoundment in question must close.

The tough news for the electric generation sector is that politics could shake up the CCR regulatory scheme, as it is presently proposed. If there is a change in presidential leadership in 2021, the proposed rules could be subject to rulemaking rollbacks. Site-specific closure commencement extensions that EPA issues in 2020 are unlikely to change once they are finalized. Conversely, site-specific determinations that EPA does not finalize in 2020 are at the most risk. The process for an alternate liner demonstration is the most vulnerable. These demonstration decisions are slated for 2021. Even if the liner demonstration process is hypothetically still available (e.g., it is not rolled back by a subsequent rulemaking), EPA will have the authority to interpret the criteria for showing a successful demonstration very narrowly. In other words, EPA could simply deny all of the demonstrations. Obviously, the coming presidential election will be a pivotal point for the future and finality of the CCR closure process.

My article entitled "Why Coal Ash Regulation Should Be On Everyone's Watch List" in the November 2019 **issue** of Environmental Notes highlights how any source that has combusted coal should be following the developments in the coal ash regulations that apply to the electric generation sector. For other industries, it continues to be important to follow the outcome of the rulemaking, judicial, and political processes on the closure regulations for the CCR Rule. Future state and federal standards regulating coal ash outside of the utility sector will grapple with the same closure issues on impoundment liner protectiveness, flexibility to seek alternate CCR disposal capacity, and the practical meaning of the RCRA Subtitle D Protectiveness Standard.

Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302 (Apr. 17, 2015).

Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure, 84 Fed. Reg. 65941 (Dec. 2, 2019).

Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure; Legacy Units, 85 Fed. Reg. 12478 (Mar. 3, 2020).

42 U.S.C. § 6944(a) (The RCRA Subtitle D protectiveness standard for CCR units is to ensure there is "no reasonable probability of adverse effects on health or the environment.").

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