

Coal Combustion Residuals: Regulatory, Litigation, and Enforcement Update

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Today's eLunch Presenters



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Today's Presentation

- EPA's Regulatory Process and Status of CCR Rules
 - Coal Combustion Residuals Proposals
 - Power Plant Effluent Limitations Guidelines
- Federal Legislative Initiatives on CCR Management
 - House of Representatives
 - Senate
- Key CCR Litigation and Enforcement Proceedings
 - *Appalachian Voices v. McCarthy*
 - GenOn Consent Decree
 - Midwest Generation
 - Duke Energy
- Conclusions

Regulatory Background

- 1980 – Bevill Amendment excludes coal ash from regulation as hazardous waste under RCRA Subtitle C
 - Bevill Amendment directed EPA to study whether regulation of coal ash under Subtitle C was warranted
- 2000 – EPA issued a “regulatory determination” concluding that CCRs did not warrant regulation under RCRA Subtitle C
 - CCRs should be regulated under RCRA Subtitle D as solid waste by establishing minimum nationwide standards for CCR disposal, but delayed issuance of the regulations
- Following the December 2008 TVA Kingston TN impoundment release, EPA decided to revisit coal ash regulation
- On June 21, 2010, EPA published its proposal to regulate CCRs under RCRA

2010 Proposed Rule

- Three options for regulation of CCRs:
 - As “special waste” under RCRA Subtitle C, when the CCRs are destined for disposal in landfills or surface impoundments (effectively phase out wet handling and disposal in surface impoundments in 5 years); direct federal enforcement
 - As non-hazardous waste under RCRA Subtitle D by establishing national minimum criteria to be implemented and enforced by the states (wet handling could continue if existing impoundments retrofitted)
 - Subtitle D prime – less costly regulation as non-hazardous waste (e.g. no composite liner requirements for existing impoundments)
- Dam safety requirements for surface impoundment under each option
- Beneficial uses of coal combustion products will remain exempt from hazardous waste regulations—with some exceptions
- Main differences involve implementation and enforcement; each option will increase compliance costs and litigation risks
- 450,000 comments; spurred multiple notices of data availability and additional requests for comment

Notices of Data Availability

- In October 2010, EPA published a NODA consisting of electric utility responses to requests for information on CCR surface impoundments and the site assessments EPA had conducted
- In October 2011, EPA published a NODA on additional information regarding:
 - Chemical constituent data from CCRs
 - Facility and waste management unit data
 - Information on additional alleged damage cases
 - Adequacy of State programs
 - Beneficial use
- In August 2013, EPA published a NODA regarding:
 - Industry responses to EPA's questionnaire for the power plant ELGs, which contain technical information regarding wastewater generation and treatment, and economic information such as costs of wastewater treatment technologies
 - Information relevant to developing appropriate criteria or otherwise defining what constitutes large-scale fill, such as data on the size of structural fills that have resulted in damage cases
 - Updating CCR leaching data using new algorithms
 - Additional fish bio-concentration factors and other chemical-specific data for hazardous constituents
 - EPA assessment reports on the structural integrity of hundreds of surface impoundments

Legal Issues

- Authority to overturn Bevill Determination
- Retroactive application of management standards
- Defects in Risk Assessment
- Authority to mandate state permits, approve state permit programs, and to impose and enforce criteria
- Mandatory 3-year review for regulations
- Environmental group comments
 - New toxicity data mandates characterizing coal ash as hazardous
 - CCR disposal under-regulated or not regulated at all by the states
- Industry group comments
 - RCRA provides the statutory basis for EPA to develop Subtitle D rules for CCR
- Lawsuits kept pressure on EPA for issuing both the ELG and CCR rules;
- ELG expected sometime this year; CCR by end of year

Proposed Effluent Limitations Guidelines (“ELGs”)

- *Defenders of Wildlife v. Jackson* – case filed in 2010 alleging EPA violated Clean Water Act Section 304(b) by failing to annually revise, if appropriate, the effluent limitations guidelines for steam electric power plants
- Proposed rule published on June 7, 2013; comment period ended September 20, 2013
- Eight options (including four preferred options) of effluent limitation guidelines (ELG) for numerous wastestreams, including fly ash wastewater, bottom ash wastewater, FGD wastewater, and leachate from CCR landfills and surface impoundments
- ELGs would apply on a date determined by the permitting authority that is as soon as possible within the next NPDES permit cycle beginning July 1, 2017

Proposed ELGs at a Glance

Wastestreams	Technology basis for the main BAT/NSPS/PSES/PSNS regulatory options							
	1	3a	2	3b	3	4a	4	5
FGD Wastewater	Chemical Precipitation.	BPJ Determination.	Chemical Precipitation + Biological Treatment.	Chemical Precipitation + Biological Treatment for units at a facility with a total wet-scrubbed capacity of 2,000 MW and more; BPJ determination for <2,000 MW.	Chemical Precipitation + Biological Treatment.	Chemical Precipitation + Biological Treatment.	Chemical Precipitation + Biological Treatment.	Chemical Precipitation + Evaporation
Fly Ash Transport Water.	Impoundment (Equal to BPT).	Dry handling	Impoundment (Equal to BPT).	Dry handling	Dry handling	Dry handling	Dry handling	Dry handling
Bottom Ash Transport Water.	Impoundment (Equal to BPT).	Impoundment (Equal to BPT).	Impoundment (Equal to BPT).	Impoundment (Equal to BPT).	Impoundment (Equal to BPT).	Dry handling/ Closed loop (for units >400 MW); Impoundment (Equal to BPT)(for units ≤400 MW).	Dry handling/ Closed loop.	Dry handling/ Closed loop
Combustion Residual Leachate.	Impoundment (Equal to BPT).	Impoundment (Equal to BPT).	Impoundment (Equal to BPT).	Impoundment (Equal to BPT).	Impoundment (Equal to BPT).	Impoundment (Equal to BPT).	Chemical Precipitation.	Chemical Precipitation
FGMC Wastewater	Impoundment (Equal to BPT).	Dry handling	Impoundment (Equal to BPT).	Dry handling	Dry handling	Dry handling	Dry handling	Dry handling
Gasification Wastewater	Evaporation	Evaporation	Evaporation	Evaporation.	Evaporation	Evaporation	Evaporation	Evaporation
Nonchemical Metal Cleaning Wastes	Chemical Precipitation.	Chemical Precipitation.	Chemical Precipitation.	Chemical Precipitation.	Chemical Precipitation.	Chemical Precipitation.	Chemical Precipitation.	Chemical Precipitation

Proposed ELGs, cont'd.

- In preamble to proposed ELG rule, EPA suggested it is leaning towards regulating CCRs as solid wastes under Subtitle D instead of as special wastes under Subtitle C and coordinating the CCR rule with the final ELG rule
 - Significant new data obtained from 495 power plants as part of 2010 Information Collection Request
 - Proposed CCR rule relied upon a 1995 industry report and a number of significant assumptions in the risk assessment that supported the proposed CCR rule
 - Data shows impoundments are generally smaller than the impoundments included in data used to support the proposed CCR rule
 - Updated risk assessment not yet completed, but the data “may have the potential to lower the CCR rule risk assessment results by as much as an order of magnitude”
- EPA confirmed it is coordinating the proposed ELG regulation with the proposed CCR rule, focusing on areas where the two rules would regulate the same type of unit
 - E.g., coordinating implementation of the two rules to allow facilities to determine the operational changes needed to comply with the ELG regulation before they would have to decide whether to close or retrofit surface impoundments under the CCR rule

Proposed ELGs: Best Management Practices (“BMPs”) for Surface Impoundments and Voluntary Incentive Program

- EPA is considering establishing BMP requirements that would apply to CCR surface impoundments
 - Would be established as part of the ELGs and implemented through NPDES permits
 - Plant operators to conduct weekly inspections of active and inactive surface impoundments, look for signs of structural instability and other hazardous conditions, and to take immediate corrective actions where warranted
 - Similar to the structural integrity inspection and corrective action requirements proposed in the CCR rule, but would not include closure requirements
 - Requirements that facilities submit to EPA or authorized state, plans for the design, construction, and maintenance of existing impoundments, closure plans, periodic inspections, and an annual certification
 - Similar to the Mine Safety and Health Administration (“MSHA”), BMP rules applicable to coal slurry impoundments
- EPA is also considering a voluntary program that would give existing power plants an additional two years to comply with the ELG rules if they:
 - Convert ash handling systems to dry handling or closed-loop tank-based systems, and convert FGD wastewater treatment to tank-based systems
 - Dewater, close, and cap all CCR surface impoundments (except CCR leachate impoundments, which could continue to operate if CCR leachate is the only type of CCR contained in the impoundment)

Proposed ELGs, cont'd.

- Industry comments:
 - Supportive of EPA's intent to coordinate the two rules
 - Subtitle D prime option should be selected because it is most compatible with the proposed ELG rule
 - Under Subtitle D prime, unlined surface impoundments can continue to operate; under Subtitle C plants would be required to close all wet surface impoundments, which contradicts some of the more lenient options of the ELG rule that allow wastewater to be treated via impoundment
 - Updated data should lower the CCR rule's original risk assessment
- Environmental organization comments:
 - ELGs do not eliminate the need for a stringent CCR rule to address potentially leaking and unstable CCR impoundments, groundwater cleanup, dust issues, and siting and construction of engineered landfills
- Under the consent decree, EPA is required to finalize the ELG rule by May 22, 2014
- December 16, 2013 status update to Court – EPA in discussions with plaintiffs to agree upon a modification to the consent decree for an extension

Federal Legislative Proposals

- H.R. 2218, Coal Residuals Reuse and Management Act of 2013 – Passed the House on July 25, 2013
- Would amend Subtitle D of RCRA under which coal ash regulated as solid waste rather than hazardous waste
- States would be allowed to establish a coal ash permitting program with EPA oversight authority
- If states decline, EPA would step in
- Coal ash permits would be required no later than seven years after enactment
- Sets forth minimum requirements that must be required by a state-issued CCR permit
 - Certification by an independent professional engineer that the design of structures including surface impoundments is in accordance with acceptable engineering practices and the construction and maintenance of the structure will ensure dam stability
 - Annual inspections by an independent professional engineer
 - State agency authority to close deficient structures
 - Location restrictions
 - Wind dispersal of dust to be prevented
- Latest action: Placed on Senate Legislative Calendar on July 30 but unlikely to be considered by the Senate

Federal Legislative Proposals, cont'd.

- H.R. 2279, Reducing Excessive Deadline Obligations Act of 2013 – Introduced in the House of Representatives on June 6, 2013, and referred to the Committees on Energy and Commerce and Transportation and Infrastructure
 - Introduced by Rep. Cory Gardner (R-CO)
 - Would amend Section 2002(b) of RCRA to eliminate the requirement to review and revise, as necessary, regulations promulgated under RCRA at least every three years
 - EPA Administrator would be required to review and revise the regulations as he or she determines is appropriate
 - Passed the House on January 9, 2014, by a vote of 225 to 188, with five Democrats voting for the bill and four Republicans voting against
 - Currently before the Senate's Committee on Environment and Public Works, but unlikely to be passed by the Senate

Legislative Prospects

- Senate action very unlikely
 - Procedural rules place high hurdle (unanimous consent or cloture motion to bypass committee)
 - Not a Reid priority

CCR Litigation and Enforcement Cases

- *Appalachian Voices v. McCarthy*: Lawsuits filed April 2012 by numerous environmental groups (Appalachian Voices, Sierra Club, Environmental Integrity Project, and others) and CCR recyclers Headwaters Resources, Inc. and Boral Material Technologies Inc.
- Environmental organization complaint
 - Section 2002(b) of RCRA requires EPA to review each RCRA regulation and revise as necessary, at least every three years
 - EPA has not reviewed and revised the CCR regulations since 1981 and “lost pace” with industry developments
 - EPA has failed to review its regulation exempting CCR from hazardous waste regulation
 - EPA has failed to revise and update the Subtitle D regulations for the management of CCR in landfills and surface impoundments
 - Existing Subtitle D regulations inadequate for protecting groundwater and surface water from CCR disposal
 - EPA has not revised the Toxicity Characteristic Leaching Procedure (“TCLP”), a test for determining whether a solid waste is toxic, and therefore, hazardous, since 2002, and has never revised the regulations to address CCR

Appalachian Voices v. McCarthy, cont'd.

- Headwaters Resources, Inc. and Boral Material Technologies Inc. complaints
 - Delay in determining whether to revise the Subtitle D regulations is creating uncertainty in the beneficial use market
 - EPA has violated Section 2002(b) of RCRA by failing to review the Subtitle D regulations and revise them as necessary, at least every three years
- Summary Judgment Memorandum Opinion and Order
 - Issued October 29, 2013
 - Denied the environmental organizations' request for an order directing EPA to review and if necessary, revise the Subtitle D regulations concerning coal ash within six months
 - Denied the recyclers' request to order EPA to announce its regulatory direction and authority for the regulation within three months
 - Ordered EPA to file a written submission with the court setting forth a proposed deadline for compliance with the obligation to review and revise if necessary, the Subtitle D regulations concerning CCR within 60 days of the court's order (by December 30)

Appalachian Voices v. McCarthy, cont'd.

- EPA filed an unopposed motion for a 30-day extension of time to submit its proposed deadline submission
- Parties have reached “an agreement in principle on a deadline for EPA to comply with its obligation to review, and revise if necessary, its Subtitle D regulations”; working on finalizing a proposed consent decree, which could be approved by the EPA and the DOJ within 30 days
- Proposed deadline submission is now due by January 29
- Consent decree will likely require EPA to complete the rulemaking by the end of 2014

CCR Lawsuits and Enforcement Actions

- **GenOn Consent Decree**
 - Notice of Intent to sue filed by a group of environmental organizations; subsequently the State filed a federal lawsuit
 - Consent decree entered in May 2013 in Maryland district court
 - GenOn agreed to pay the Maryland Department of the Environment a \$1.9 million civil penalty for groundwater and surface water contamination claims, investigate and remediate contamination, install liner systems on leachate and stormwater collection ponds, cap all closed CCR ponds
- **Lawsuit against Midwest Generation**
 - Filed before the Illinois Pollution Control Board (Board) by the Sierra Club and other environmental groups in October 2012
 - Alleging groundwater contamination from CCR ponds at four Midwest Generation facilities
 - On October 3, 2013, the Board denied Midwest Generation's motion to dismiss the complaint as frivolous or duplicative based upon the existence of Compliance Commitment Agreements between Midwest Generation and the Illinois Environmental Protection Agency
- **Lawsuits against Duke Energy**
 - On September 12, 2013, the SELC and other environmental groups sued Duke Energy Progress in federal court under the Clean Water Act for alleged CCR pollution from its Sutton plant
 - SELC and the NCDENR have pending lawsuits against other Duke facilities

CCR Lawsuits and Enforcement Actions, cont'd.

- *Winyah Rivers Foundation v. S.C. Public Service Authority* (D.S.C.)
 - Complaint filed April 29, 2013, citing violations of the Clean Water Act
 - Lawsuit also filed in state court alleging violations of the S.C. Pollution Control Act
 - Grainger Station closed due to the lawsuits
 - In November 2013, the parties reached a settlement agreement resolving both lawsuits, under which S.C. Public Service Authority agreed to remove 1.3 million tons of CCR stored in unlined ponds beside the Waccamaw River within 7-10 years
- *Anderson v. FirstEnergy Corporation* (D.W.V.)
 - Complaint filed October 10, 2013, by more than 50 West Virginia residents
 - Common law claims of negligence, private nuisance, and trespass
 - Alleging contamination of plaintiffs' properties from the unlined Little Blue Run impoundment at FirstEnergy's Bruce Mansfield Plant
 - FirstEnergy previously settled a PADEP action in a December 2012 consent decree that required FirstEnergy to submit a closure plan for the impoundment by March 31, 2013
 - Complaint alleges that closure under FirstEnergy's proposed closure plan won't begin in 2017 and won't end until 2032

CCR Lawsuits and Enforcement Actions, cont'd.

- TVA Ash Spill Litigation (E.D. Tenn.)
 - 60 consolidated cases involving more than 800 plaintiffs
 - Bifurcation (Phase I v. Phase II)
 - Phase I August 23, 2012 liability decision
 - Dismissed claims: negligence per se, recklessness, strict liability, and public nuisance
 - TVA liable for negligence, trespass and private nuisance
 - Cited (1) selection of location of dike, (2) designs of dike, and (3) failure to adequately inform employees of applicable policies and procedures
 - “Had TVA followed its own mandatory policies, procedures and practices, the subsurface issues underlying the failure of the North Dike would have been investigated, addressed, and potentially remedied before the catastrophic failure on December 22, 2008.”
 - Phase II: Individualized evidentiary proceedings on damages
 - November 20, 2012 order referred Phase II of the litigation to mediation
 - Litigation proceedings currently stayed pending mediation
 - Three extensions of the deadline for the conclusion of mediation
 - October 24, 2013 order extended mediation for an additional 105 days

Conclusions

- Continued push for RCRA Subtitle C regulation by environmental organizations
- Momentum appears to be leaning towards a Subtitle-D-type program that is coordinated with the power plant effluent limitations guidelines
- Legislative prospects unlikely but the House remains active
- Litigation against operators of CCR impoundments and landfills continues
- Lawsuits largely driven by environmental organizations
 - Demands
 - Phase-out of wet CCR storage
 - Retrofit with covers, liners and leachate collection
 - Investigation and remediation of groundwater contamination

Questions?

Thank You.

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