

July 31, 2018

EPA AMENDMENTS TO THE COAL ASH RULE

To Our Clients and Friends:

On July 30, 2018, the Environmental Protection Agency ("EPA") published a final rule amending the national minimum criteria for existing and new landfills and surface impoundments that contain coal combustion residuals ("CCR"), also known as coal ash.^[1] This rule, which directly affects over four hundred coal-fired electricity generating plants nationwide, is the first in a series of anticipated amendments altering regulations promulgated under the Obama Administration to address the disposal of coal ash in landfills and surface impoundments. This first phase of regulatory changes has three key elements:

1. It adopts two alternative performance standards that either participating state directors or the EPA may apply to owners and operators of CCR units;
2. It revises groundwater protection standards ("GWPS") for four regulated constituents which do not have an established maximum contaminant level under the Safe Drinking Water Act; and
3. It extends certain deadlines by which facilities must cease the placement of waste in CCR units that are closing.

I. Background and Context

Coal ash is produced from the burning of coal in coal-fired power plants. According to the American Coal Ash Association, approximately 110 million tons of coal ash are generated every year, making it one of the most-generated forms of industrial waste in the United States. While over one-third of all coal ash produced in the United States is recycled into construction materials, such as concrete or wallboard, a significant amount must be disposed of each year. Coal ash contains contaminants like mercury, cadmium, and arsenic, which can pose environmental and health risks if not properly managed or disposed of.

On April 17, 2015, the Obama Administration promulgated regulations setting federal standards for the disposal of coal ash pursuant to its authority under the Resource Conservation and Recovery Act, notably regulating such waste as a solid waste pursuant to Subtitle D, rather than as a hazardous waste pursuant to Subtitle C.^[2] The regulations addressed the risks associated with disposal, including leaking of contaminants into ground water, blowing into the air as dust, and catastrophic failure of coal ash surface impoundments. EPA set certain minimum criteria consisting of location restrictions, design and operating criteria, groundwater monitoring and corrective action requirements, closure and post-closure care requirements, and record keeping, notification, and internet posting requirements. It also required

unlined CCR surface impoundments contaminating groundwater above certain protection standards to stop receiving wastes and either retrofit or close, except in certain circumstances.

Congress subsequently passed the Water Infrastructure for Improvements to the Nation ("WIIN") Act, signed into law on December 16, 2016, which authorized EPA-approved state permitting programs to regulate coal ash disposal.^[3] Under the WIIN Act's Section 2301, states may develop and operate their own permitting programs that adhere to, or are at least as protective as, the EPA's standards. On June 18, 2018, Oklahoma became the first (and so far only) state to have its permit program approved for the management of coal ash. The EPA regulates coal ash disposal in states that choose not to implement permitting programs or that have inadequate programs that fail to meet federal standards.

II. Amendments to the 2015 Regulations

On September 13, 2017, the EPA granted petitions from certain industry groups requesting reconsideration of certain provisions of the 2015 regulations in light of the WIIN Act and other factors. EPA announced that it anticipates completing reconsideration of all provisions in two phases: a first phase, which includes these amendments, to be finalized no later than June 2019, and a second phase to be proposed by September 30, 2018 and finalized by December 2019.

The recently signed Amendments constituting phase one, part one, make three major changes to the prior regulations governing coal ash management and disposal. First, EPA adopted two alternative performance standards that either participating state directors in states with approved CCR permit programs, or EPA where it is the permitting authority, may apply to owners and operators of CCR units: (1) the suspension of groundwater monitoring requirements if there is evidence that there is no potential for migration of hazardous constituents to the uppermost aquifer during the active life of the unit and post-closure care; and (2) the issuance of technical certifications in lieu of the current requirement to have professional engineers issue certifications.

Second, the Amendments revise the GWPSs for the four constituents^[4] which do not have established maximum contaminant levels under the Safe Drinking Water Act, in place of the background levels under 40 CFR § 257.95(h)(2). This revision adopts national criteria as health-based standards available to facilities to use to compare against monitored groundwater concentrations and to develop cleanup goals.

Finally, the Amendments extend the deadline for when CCR units closing for cause must initiate closure under two circumstances: (1) where the facility has detected a statistically significant increase from an unlined surface impoundment above a GWPS; and (2) where the unit is unable to comply with the aquifer location restriction. With respect to unlined surface impoundments, the Amendments extend the 90-day period in which the owner or operator is to perform the required analysis and demonstrations by 18 months, until October 31, 2020. With respect to aquifer location restrictions, the revision extends the timeframes during which facilities may continue to use the units by the same period, until October 31, 2020. The EPA states that this extension allows facilities time to adjust their operations and better coordinate engineering, financial, and permitting activities.

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Generally speaking, these changes reduce the compliance obligations for facilities managing coal ash surface impoundments and provide increased flexibility in the management of coal ash. They also grant the industry more time for compliance with the 2015 regulations, addressing concerns about feasibility of compliance within the original deadlines.

These regulations are subject to challenge, even as EPA considers additional rulemakings to address other aspects of the 2015 coal ash rule. In addition, EPA is currently scheduled to propose revisions to the Clean Water Act's Effluent Limitation Guidelines applicable to steam electric power generators in December 2018, potentially posing added challenges relating to overlapping compliance schedules relevant to the management and disposal of coal ash. In light of the ongoing complexities of the regulatory landscape, owners or operators of coal ash disposal facilities should evaluate how these proposed changes will impact their operations, costs, and investments.

[1] See Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One); Final Rule (83 Fed. Reg. 36435, July 30, 2018) (hereinafter, the "Amendments").

[2] 40 C.F.R. § 257 pt. D.

[3] Water Infrastructure for Improvements to the Nation Act, Pub. L. No. 114-322, 130 Stat. 1628 (2016).

[4] These four constituents are cobalt, lithium, molybdenum, and lead.



The following Gibson Dunn lawyers assisted in the preparation of this client alert: Avi Garbow and Courtney Aasen.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these issues. For additional information about this regulatory change and other regulations affecting the management and disposal of coal ash, or related litigation, please contact the Gibson Dunn lawyer with whom you usually work or the following leaders of the firm's Environmental Litigation and Mass Tort practice group:

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