

PUBLICATION

EPA Proposes new Regulations for Coal Combustion Residuals with Potential Cost to Industry of \$1.5 Billion per year

May 5, 2010

On Tuesday, May 4, 2010, EPA signed a proposed rule to regulate for the first time coal combustion residuals (CCRs). The proposed rule addresses the risks associated with the disposal of wastes generated by electric utilities and independent power producers. CCRs from non-utility coal-burning boilers are not included within the proposed rule.

EPA's proposed rule considers two options for the management of coal ash, both of which fall under the Resource Conservation and Recovery Act (RCRA): 1) CCRs destined for disposal in a landfill or surface impoundment would be listed as a special waste to be regulated under the RCRA subtitle C regulations; or 2) Establishment of national criteria for the regulation of CCR disposal, ensuring that wastes disposed of in surface impoundments or landfills would fall under RCRA subtitle D requirements.

Option 1 includes generator and transporter requirements and the requirements for facilities managing CCRs, such as siting, liners (with modification), run-on and run-off controls, groundwater monitoring, fugitive dust controls, financial assurance, corrective action to include facility-wide corrective action, closure of units, and post-closure care (with certain modifications). In addition, facilities that dispose of, treat, or in many cases, store CCRs would be required to obtain permits for the units in which such materials are disposed, treated and stored. There are also proposed requirements for dam safety and stability for impoundments, land disposal restrictions and treatment standards for CCRs, as well as a prohibition on the disposal of treated CCRs below the natural water table.

Under Option 2, units receiving CCR waste would be subject to, among other things:

- Location standards;
- Composite liner requirements – new landfills and surface impoundments would require composite liners;
- Retrofitting requirements – existing surface impoundments without liners would have to retrofit within five years or cease receiving CCRs and close;
- Groundwater monitoring and corrective action standards for releases;
- Closure and post-closure care requirements; and
- Requirements to address the stability of surface impoundments.

EPA is also soliciting comments on requiring financial assurance under Option 2. Because of the scope of subtitle D authority, the rule would not require permits, nor could EPA enforce the requirements. Instead, states or citizens could enforce the requirements under RCRA citizen suit authority; the states could also enforce any state regulation under their independent state enforcement authority.

EPA took special care in the proposed rule not to impact the beneficial use of CCRs by carving out an exemption for beneficial reuse. According to EPA, "the Bevill exclusion should remain in place for CCRs going to certain beneficial uses, because of the important benefits to the environment and the economy from these uses, and because the management scenarios for these products are very different from the risk case being

considered for CCR disposal in surface impoundments and landfills." EPA solicits comments, however, on whether "unencapsulated" uses of CCRs warrant tighter federal control.

The potential impact of the rule is great, given that power plants and other industries in the United States produce more than 136 million tons of ash and other coal combustion byproducts every year. The EPA has estimated that Option 1 would cost the industry \$1.5 billion a year, and Option 2 \$600 million a year.

The draft rule will not be official until published in the federal register, which should occur this week. You may view a copy of the unofficial rule by clicking [here](#). Once published in the federal register, the 90-day period for providing comments on the rule will be triggered.

Baker Donelson attorneys are following this issue closely and are able to provide comments to the EPA on your behalf as well as advise you on the impact of the proposed rule on your operations. If you have questions about this issue, please don't hesitate to contact your Baker Donelson attorney.