



The Committee on Energy and Commerce

Memorandum

January 20, 2015

To: Members, Subcommittee on Environment and the Economy

From: Committee Staff

Subject: Hearing entitled “EPA’s 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities”

On Thursday, January 22, 2015, at 10:00 a.m. in 2123 Rayburn House Office Building, the Subcommittee on Environment and the Economy will have a hearing entitled “EPA’s 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities” and will consider whether legislation is still necessary.

I. Witnesses

A. Panel 1

- The Honorable Mathy Stanislaus, Assistant Administrator for Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency.

B. Panel 2

- Mr. Thomas Easterly, Commissioner, Indiana Department of Environmental Management (*on behalf of the Environmental Council of States and the Indiana Department of Environmental Management*);
- Mr. Michael Forbeck, Environmental Program Manager, Pennsylvania Department of Environmental Protection, Bureau of Waste Management (*on behalf of the Association of State and Territorial Solid Waste Management Officials*);
- Ms. Lisa Johnson, Chief Executive Officer & General Manager, Seminole Electric Cooperative, Inc. (*on behalf of National Rural Electric Cooperative Association and Seminole Electric Cooperative, Inc.*);
- Mr. Thomas Adams, Executive Director, American Coal Ash Association (*on behalf of the American Coal Ash Association*);
- Mr. James Roewer, Executive Director, Utilities Solid Waste Activities Group (*on behalf of USWAG, Edison Electric Institute, and the American Public Power Association*);

- Mr. Eric Schaeffer, Director, Environmental Integrity Project
- Frank Holleman, Senior Attorney, Southern Environmental Law Center

II. Background

A. Coal Combustion Residuals

The Environmental Protection Agency (EPA) defines fossil fuel combustion wastes as “the wastes produced from the burning of fossil fuels (i.e., coal, oil, natural gas).”¹ One subset of fossil fuel combustion wastes is coal combustion wastes generated at electricity production facilities, also known as coal combustion residuals (CCR) or coal ash.² CCR has been defined by EPA as “byproducts of burning coal for electricity” and consists of inorganic residues that remain after pulverized coal is burned.

Fossil fuel combustion wastes are categorized by EPA as “special waste,” but Congress, in the Solid Waste Disposal Act Amendments of 1980 (Public Law 96-482), enacted provisions – known as the Bevill Amendment – that prevented EPA from imposing hazardous waste regulatory requirements for fossil fuel combustion wastes until EPA studied the issue and submitted a report to Congress regarding whether regulation of such waste under Subtitle C of the Solid Waste Disposal Act was warranted.

To date, EPA has completed two regulatory determinations, one in 1993 and the other in 2000. In both regulatory determinations, EPA considered the requisite factors and determined that regulation of fossil fuel combustion wastes, and CCR, specifically, was not warranted under Subtitle C.

B. Description of the Proposed Rule

On June 21, 2010, EPA proposed a Federal regulatory standard for CCR³ in the wake of the structural failure of a surface impoundment at the Tennessee Valley Authority’s plant in Kingston, Tennessee in December 2008 (Proposed Rule). EPA set out two possible regulatory options. Under the first proposal, EPA suggested that the proposed rule could reverse the 2000 regulatory determination and allow regulation of CCR as a hazardous waste under Subtitle C. Under the Subtitle C proposal, EPA would have been able to permit and enforce activities related to the disposal of coal ash. Under the Subtitle C approach, EPA would have phased out existing impoundments over a seven year period.

The second proposal suggested the regulation of CCR as a non-hazardous waste regulated under Subtitle D. The Subtitle D program would not have been federally enforceable, but would have been enforceable only through citizen suits. The requirements of the Subtitle D program

¹ See <http://www.epa.gov/wastes/nonhaz/industrial/special/fossil/>

² See <http://www.epa.gov/wastes/nonhaz/industrial/special/fossil/coalashletter.htm>

³ See 75 FR 35128 (June 21, 2010).

are self-implementing, which means that the owners or operators of the disposal facilities do not receive permits, but certify compliance with the requirements in the Federal rule. Under the Subtitle D approach, existing impoundments would be required to retrofit with liners five years after promulgation of the final rule. EPA also proposed an approach referred to as Subtitle D Prime which would not have required the retrofit.

Key objectives noted by EPA for both options in the Proposed Rule were to require first-ever national standards including: liners and siting restrictions for new coal ash land disposal units; dam safety and structural stability assessment of coal ash disposal units; groundwater monitoring for disposal units that receive coal ash; run-on and run-off controls; fugitive dust controls; financial assurance; corrective action; closure of units; and post-closure care.

C. Description of the Final Rule

EPA released a pre-publication version of the final rule regulating coal ash on December 19, 2014 (the Final Rule).⁴ The Final Rule regulates coal ash under Subtitle D of RCRA and will become effective six months from the date of its publication in the Federal Register. While EPA selected the Subtitle D regulatory option for coal ash, the Agency makes clear in the preamble to the rule that it is still in the process of evaluating whether to reverse its Bevill regulatory determination and regulate coal ash under Subtitle C of RCRA.

As with the Proposed Rule, the Final Rule is self-implementing, meaning that it does not require issuance of permits. Rather, owners and operators of facilities regulated by the Final Rule must comply with the requirements without the interaction of a regulatory authority by certifying compliance with the requirements. EPA notes in the preamble to the Final Rule that if a State revises its Solid Waste Management Plan to incorporate the Federal requirements, facilities in compliance with an EPA-approved State solid waste management plan for coal ash that is identical to or more stringent than the Final Rule should be viewed as meeting or exceeding the Federal criteria.

However, there is no mechanism to legally incorporate the Federal requirements into State programs. Thus, even if a State adopts the Final Rule and incorporates the criteria into the State's solid waste management program, the Final Rule remains in place as an independent set of requirements that must be met. Also, because the rule is promulgated under Subtitle D and does not require regulated facilities to obtain permits, does not require the States to adopt and implement the new rules, and cannot be enforced by EPA – the rule's only compliance mechanism is for a State or citizen group to bring a RCRA citizen suit in Federal district court under section 7002 of that statute against any facility that is alleged to be in noncompliance with the new requirements.

Some notable provisions in the Final Rule include:⁵

⁴ <http://www2.epa.gov/coalash/pre-publication-version-coal-combustion-residuals-final-rule>

⁵ http://www2.epa.gov/sites/production/files/2014-12/documents/factsheet_ccrfinal_2.pdf

- *Inactive Impoundments or “Legacy Sites”* – The Final Rule applies to *inactive* coal ash surface impoundments (those not receiving coal ash on or after the effective date of the rule) if the inactive impoundment contains coal ash and liquids. If an inactive surface impoundment closes (dewatering and final cover) within three years of the rule being promulgated in the Federal Register, it is excluded from further regulation. However, inactive surface impoundments that cannot close within the three year time period will be regulated in the same manner as existing coal ash surface impoundments and will be subject to all of the requirements in the Final Rule. The Final Rule does not apply to inactive coal ash landfills (landfills that cease receiving coal ash prior to the effective date of the rule).
- *Location Restrictions* – The rule establishes five location restrictions to help ensure that landfills and surface impoundments are appropriately sited. These include restrictions related to placement above the uppermost aquifer, in wetlands, in fault areas, in seismic impact zones and in unstable areas. Owners or operators must demonstrate that their existing landfills or surface impoundments meet these restrictions currently or can demonstrate that they can meet the restrictions through engineering enhancements or established alternatives or they must close the unit. New units must be built in compliance with the requirements.
- *Beneficial Use* – The Final Rule does not regulate coal ash that is beneficially used, but it contains a new definition as to what constitutes beneficial use in order to distinguish beneficial use from disposal. Existing beneficial use activities that do not fall within the definition are considered disposal and are subject to regulation under the rule as a CCR landfill or surface impoundment. The rule does not apply to placement of coal ash at active or abandoned underground or surface coal mines; these activities will be the subject of later rulemaking by the Department of Interior’s Office of Surface Mining.
- *Groundwater Monitoring/Corrective Action* – The Final Rule requires the owner or operator of a CCR unit to install groundwater monitoring wells and analyze data to detect the presence of hazardous constituents. If hazardous constituents are found in the groundwater above groundwater protection standards, the owner or operator immediately must begin the corrective action process to clean up the contamination caused by the unit. However, if the unit causing contamination is an unlined surface impoundment, there is no opportunity for corrective action, and it must immediately begin the closure process. EPA notes in the preamble of the Final Rule that because the Final Rule is self-implementing with no regulatory oversight, certain flexibility associated with the rule’s groundwater monitoring and corrective action programs that was included in the proposal has been eliminated from the Final Rule. For example, the Final Rule does not permit the establishment of an alternate groundwater protection standard (must use the MCL or background levels under the Final Rule) nor does it permit the decision that corrective action is not necessary based on site-specific conditions.
- *Dam/Structural Stability* – The Final Rule establishes structural integrity design criteria and requires that owners and operators periodically conduct a number of structural integrity related assessments, including for example:

- Periodic structural stability assessments by a qualified professional engineer and periodic safety factor assessments to document that the unit achieves minimum engineering factors of safety;
- Conducting periodic hazard potential classification assessments to assess the damage that would occur if there were a failure of the CCR surface impoundment;
- Conducting periodic safety factor assessments to document whether the CCR disposal unit achieves minimum factors of safety; and
- Weekly inspections of the CCR unit and monthly monitoring of unit instrumentation.
- *Closure* – Closure of a coal ash unit is triggered when a unit fails to meet certain criteria:
 - If the CCR unit cannot meet the location criteria or the engineering demonstrations that the unit can still operate safely even though it does not meet the location restrictions;
 - If an unlined CCR surface impoundment is found to contaminate groundwater in excess of a groundwater protection standard; or
 - If a CCR surface impoundment cannot demonstrate that it meets the minimum factors of safety regarding structural integrity of the unit.

III. Issues

The purpose of the hearing is to consider the following questions regarding the Final Rule:

- Does the Final Rule resolve the regulatory uncertainty for the recycling industry created by EPA's proposed Subtitle C rule?
- Does the Final Rule provide for an enforceable permit program that contains minimum Federal standards for the regulation of coal ash?
- Does the Final Rule provide regulatory certainty for the utility industry by creating a single, clear standard for the regulation of coal ash?
- Does the Final Rule provide authority to the States to adopt and enforce coal ash permit programs?
 - Does EPA have authority to approve State programs?
 - If a State adopts the Federal requirements in the Final Rule, will State programs operate in lieu of the Federal requirements or will there be a dual program?

- Does the Final Rule take a measured approach to the regulation and closure of existing impoundments through the use of performance standards rather than requiring across-the-board closure?
- Will the Final Rule allow States to do risk-based cleanups for CCR disposal units?
- Does the Final Rule address (legacy) surface impoundments that are no longer receiving coal ash, and is the approach taken by the Final Rule authorized by the Solid Waste Disposal Act?
- How will the provisions of the Final Rule be enforced and will there be national uniformity?
- Will the Final Rule result in an increase litigation and citizen suits?

Staff Contacts

If you have any questions, please contact Tina Richards at 225-2927.