



March 20, 2015

TO: Members, Subcommittee on Environment and the Economy
FROM: Committee Majority Staff
RE: Subcommittee Markup

I. INTRODUCTION

The Subcommittee on Environment and the Economy will meet in open markup on March 24 and 25, 2015, in 2123 Rayburn House Office Building.

On Tuesday, March 24, 2015, at 5:00 p.m., the Subcommittee on Commerce, Manufacturing, and Trade will convene for opening statements only. The Subcommittee will reconvene on Wednesday, March 25, 2015, at 9:30 a.m. to consider the following:

- H.R. ____, Improving Coal Combustion Residuals Regulation Act of 2015'

II. EXPLANATION OF LEGISLATION

A. Legislative and Regulatory History of Coal Combustion Residuals

Generally, the management and disposal of waste is regulated by States under provisions of the Solid Waste Disposal Act (RCRA, 42 U.S.C. §6901 et seq.). Subtitle C of RCRA created a hazardous waste management program that, among other provisions, directs the Environmental Protection Agency (EPA) to develop criteria for identifying the characteristics of “hazardous” waste and to develop waste management criteria applicable to such waste. Subtitle D of RCRA established State and local governments as the primary planning, regulating, and implementing entities for the management of solid waste (i.e., household garbage (or municipal solid waste) and non-hazardous industrial solid waste).

The Solid Waste Disposal Act Amendments of 1980 (Public Law 96-482) contained provisions – known as the Bevill Amendments – that prevented EPA from imposing hazardous waste regulatory requirements for fossil fuel combustion (FFC) waste until EPA studied the issue to determine whether regulation of FFC waste under Subtitle C was warranted. In its 1993 and 2000 regulatory determinations, EPA considered the requisite factors and determined that regulation of FFC wastes, generally, and coal combustion residuals (CCR), specifically, was not warranted under Subtitle C.

On June 21, 2010, EPA promulgated a proposed rule (75 FR 35128) setting out two regulatory options for management of CCRs. Under the first proposal, EPA would reverse the 2000 regulatory determination and regulate CCR as a hazardous waste under Subtitle C. Under the second proposal, EPA would continue to follow the findings of the 2000 regulatory determination, and CCR would remain classified as a non-hazardous waste regulated under Subtitle D.

EPA released a pre-publication version of the final rule regulating coal ash on December 19, 2014 (Final Rule).¹ The Final Rule regulates coal ash under Subtitle D 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. Therefore, 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, the rule is promulgated under Subtitle D. As such it 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 a facility that is alleged to be in noncompliance with the new requirements.

B. Description of H.R. ____, Improving Coal Combustion Residuals Regulation Act of 2015

The bill establishes State permit programs for coal ash, and it incorporates as the minimum Federal requirements, the technical standards and requirements that EPA developed in the Final Rule as being protective of human health and the environment.

1. Every State Will Have a Permit Program

The bill authorizes States to adopt and implement coal combustion residuals permit programs that include the minimum requirements set out in the legislation. The bill allows States to choose whether to implement a coal combustion residuals permit program. If a State is currently authorized to implement a permit program under section 3006 or section 4005 of RCRA, the State will be authorized to immediately implement a coal ash permit program. If a State opts not to implement a permit program, then EPA will implement a program for that State. States would be required to notify EPA within 6 months of enactment whether or not they intend to implement their own coal ash permit program. States would be required to provide EPA details of the laws, regulations, and other features of their permit programs within 2 years from the date of enactment. States may receive up to 12 additional months to complete certification of its permit program to EPA if legislative or rulemaking issues prevent the State from meeting the 2 year deadline.

¹ <http://www2.epa.gov/coalash/pre-publication-version-coal-combustion-residuals-final-rule>

2. Every Permit Program Will Contain the Minimum Requirements

The bill requires that every coal ash permit program include all of the minimum requirements laid out in the legislation. States may choose to make their permit programs more protective than the minimum Federal requirements. EPA will have the ability to review State permit programs at any time to ensure that the permit programs meet the minimum statutory requirements.

3. The Minimum Requirements for Every Permit Program Will be based on EPA's Requirements in the Final Rule

The legislation in previous Congresses used the Municipal Solid Waste regulations under the Solid Waste Disposal Act as the basis for the minimum requirements for a coal ash permit program. The bill takes into account that the technical requirements set forth by EPA in the Final Rule are protective of human health and the environment and should be the standard for regulating coal ash. The bill incorporates the requirements in the Final Rule and uses them as the baseline for what must be included in every coal ash permit program.

Many of the requirements of the Final Rule are incorporated directly. For example, the design requirements (257.70 and 257.72), post-closure care requirements (257.104), air criteria (257.80), record keeping requirements (257.105), requirements for run-on/run-off controls (257.81), requirements regarding hydrologic and hydraulic capacity requirements (257.82), and requirements for inspections (257.83 and 257.84). The bill also requires that criteria regarding surface water protection and financial assurance be included in coal ash permit programs, and requires financial assurance for maintaining final cover on closed inactive impoundments.

EPA acknowledged in the preamble to the Final Rule that it removed certain flexibility afforded other Subtitle D permit programs regarding groundwater monitoring and corrective action because the final coal ash rule was self-implementing. The bill authorizes States to incorporate this flexibility into a permit program. The flexibility in the bill is limited to the flexibility that States would have under the Municipal Solid Waste regulations in 40 CFR Part 258.

4. Every Permit Program will Address Inactive Surface Impoundments

The bill addresses inactive surface impoundments (those that no longer receive coal ash as of the date of enactment, but still contain coal combustion residuals and liquids) in the same manner as the Final Rule. Within 2 months of the date of enactment, the owner or operator of every inactive surface impoundment must notify EPA and the State in which it is located regarding whether it intends to close or be regulated as a structure. If an inactive impoundment fails to close within 3 years from date of enactment, it becomes a structure and will immediately be subject to all of the same requirements as any other regulated structure – even in the absence of a permit. The bill provides for the possibility of a short extension for the closure deadline if it can be demonstrated, based on the factors EPA set out in the Final Rule, that closure cannot be safely completed in 3 years and if there is no immediate threat of release.

5. Compliance Timeframes are Comparable to the Final Rule

Within 8 months of the date of enactment, the implementing agency shall require that owners and operators comply with the following requirements:

- Air criteria [(c)(2)(F)],
- Surface water requirements [(c)(2)(H)],
- Recordkeeping [(c)(2)(I)],
- Inspections [(c)(2)(M)], and
- Installation of a permanent marker at surface impoundments [257.73(a)(1)].

Not more than 3 years after the date of enactment – even in the absence of a permit – the provisions of the Final Rule will be imposed on all owners and operators of structures and inactive surface impoundments that did not close:

- Groundwater monitoring requirements,
- Run-on and run-off controls,
- Hydrologic and hydraulic capacity requirements, and
- Structural integrity requirements.

6. Discussion Draft does not Impact the Ability to bring Citizen Suits

The legislation does not alter the ability to bring citizen suits under the Solid Waste Disposal Act. Rather, it will alleviate citizen suits as being the only mechanism for enforcement of the requirements and will prevent technical compliance decisions from being made by the courts.

7. States Must Provide the Public Access to Information

The bill requires that every State, as part of its permit program, make information available to the public regarding groundwater monitoring data, emergency action plans, fugitive dust control plans, notifications regarding closure (including certifications of closure by a qualified professional engineer), and corrective action remedies.

III. STAFF CONTACTS

If you have questions, please contact Tina Richards with the Committee staff at 5-2927.