

## EPA Releases Dual Proposal to Regulate CCR under RCRA

On May 4, 2010, the Environmental Protection Agency (EPA) released two alternative proposals to regulate the disposal of coal combustion residuals (CCR)—fly ash, bottom ash, boiler slag, and flue gas desulfurization materials that are generated from processes intended to generate power—under the Resource Conservation and Recovery Act (RCRA). Both proposals would regulate CCR only from electric utilities and independent power producers intended for disposal in landfills and surface impoundments; neither would regulate CCR intended for beneficial reuse. EPA appears to favor the first proposal, supported by environmental groups, under which CCR destined for disposal in landfills or surface impoundments would be listed as a “special” waste subject to the strict regulatory controls of Subtitle C, which typically apply only to hazardous waste.<sup>1</sup> Under the second proposal, EPA would regulate CCR as a non-hazardous waste subject to the less restrictive regulatory controls of Subtitle D. Both proposals would increase compliance costs and litigation risks facing the electric utility industry and independent power producers. Thus, the electric generation industry should be preparing now for the costly and complicated regulatory regime governing the disposal of CCR that is sure to be imposed in the near future.

### RCRA Subtitle C Regulation

Subtitle C regulates hazardous waste—waste that exhibits certain hazardous characteristics or that is specifically listed as a hazardous waste by EPA—from its generation to its disposition (*i.e.*, from cradle to grave). Subtitle C requirements apply to entities that generate, transport, treat, store, or dispose of hazardous waste. A facility that treats, stores, or disposes of hazardous waste must obtain a permit that incorporates all of the design and operating standards established by EPA regulations implementing Subtitle C. A permitted facility must provide financial assurance that it can meet its Subtitle C obligations. Land disposal of hazardous waste (*e.g.*, in a landfill or surface impoundment) is generally prohibited unless the waste is first treated to meet standards established by EPA. In addition, facilities that spill or release a hazardous substance must comply with reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act. Although Subtitle C is generally implemented through EPA-authorized state programs, EPA retains authority to enforce the federal requirements.

### RCRA Subtitle D Regulation

A waste that is not a hazardous waste is regulated under Subtitle D. Under Subtitle D, EPA establishes minimum nationwide standards for waste disposal. These standards are then implemented by state and local governments. EPA does not retain authority to enforce the federal requirements. Subtitle D regulation is considered to be significantly less strict than Subtitle C regulation due in part to state and local, rather than federal, enforcement. In addition, Subtitle D applies only to waste disposal. EPA does not have the authority under Subtitle D to establish requirements governing the generation, transportation, storage, or treatment of non-hazardous waste.

<sup>1</sup> Under the first proposal, EPA would list CCR destined for disposal in landfills and surface impoundments as a “special” waste subject to the regulatory controls of Subtitle C, which typically apply only to hazardous waste. EPA explained that it would list CCR as a “special” waste instead of a hazardous waste, in part, to mitigate any stigma that would otherwise be imposed on CCR destined for beneficial reuse if CCR were listed as a hazardous waste.

BEIJING  
CHARLOTTE  
CHICAGO  
GENEVA  
HONG KONG  
LONDON  
LOS ANGELES  
MOSCOW  
NEW YORK  
NEWARK  
PARIS  
SAN FRANCISCO  
SHANGHAI  
WASHINGTON, D.C.

## History of CCR Regulation Under RCRA

CCR was initially excluded from regulation under Subtitle C under the so-called Bevill Amendment to RCRA. Under the Bevill Amendment, EPA was directed to study the issue and to make a determination on whether or not regulation of CCR under Subtitle C was warranted. EPA was directed to use eight factors to aid in its determination: (1) source and volumes of CCR generated per year; (2) present disposal and utilization practices; (3) potential danger, if any, to human health and the environment from the disposal and reuse of CCR; (4) documented cases in which danger to human health or the environment from surface runoff or leachate has been proved; (5) alternatives to current disposal methods; (6) the cost of such alternatives; (7) the impact of the alternatives on the use of coal and other natural resources; and (8) the current and potential utilization of CCR. In 2000, EPA considered these factors and determined that regulation of CCR under Subtitle C was not warranted; instead, it determined that EPA should issue regulations under Subtitle D to establish minimum nationwide standards for CCR disposal. EPA has yet to issue these Subtitle D regulations.

## EPA's Proposal

EPA was prompted to revisit the issue of CCR regulation in December 2008, after a surface impoundment at a facility in Kingston, Tenn., ruptured, spilling 5.4 million cubic yards of CCR across 300 acres. Instead of issuing regulations under Subtitle D, as it had announced it would in 2000, EPA chose to reconsider the determination it made under the Bevill Amendment. The fact that EPA released two regulatory proposals indicates that, ostensibly, EPA is still reconsidering that determination. Under the first proposal, EPA would reverse its 2000 determination and regulate CCR under Subtitle C. Under the second proposal, EPA would leave the 2000 determination in place and regulate CCR under Subtitle D.

Despite releasing two regulatory proposals, EPA appears to be leaning in favor of reversing its 2000 determination and regulating CCR (except CCR intended for beneficial reuse) under Subtitle C. In the dual proposal, EPA explained that new information has come to light since 2000 that has called into question EPA's original assessment of the risks posed by CCR disposal. For example, EPA referenced a 2009 EPA Risk Assessment that indicates certain CCR disposal practices—specifically, disposal in landfills and surface impoundments without composite liners and disposal of wet CCR—can pose significant risks to human health and the environment. In addition, EPA noted a growing record of proven damage cases to groundwater and surface water, which demonstrate that CCR has caused greater damage to human health and the environment than originally estimated. Finally, EPA noted that state regulatory programs often lack key

protective requirements for liners and groundwater monitoring. EPA also provided a cost-benefit analysis under the two proposals that appears to heavily favor regulating CCR under Subtitle C. EPA estimated that the benefits of Subtitle C regulation would be between \$87 billion and \$102 billion over 50 years, compared to the benefits of Subtitle D regulation, which would be between \$35 billion and \$42 billion. EPA estimated that the costs to industry over the same time period would be \$20.3 billion under Subtitle C and \$8.1 billion under Subtitle D.

EPA explained that it will not revise its 2000 determination with respect to the regulation of CCR destined for beneficial reuse. Because of the benefits of beneficial reuse of CCR to both the environment and the economy, CCR destined for use in new products such as cement, concrete, brick, wallboard, and roofing materials will not be regulated under either Subtitle C or Subtitle D. Many argue, however, that EPA has already “tainted the well” and that the beneficial reuse market will markedly contract because EPA's proposed action would impose a perceived stigma on products and materials that incorporate CCR, which if handled otherwise, would be deemed hazardous. EPA also clarified that the use of large volumes of CCR in sand and gravel pits or for restructuring landscape (*i.e.*, certain “unencapsulated” uses of CCR) would not be considered beneficial reuse and thus would be subject to regulation.

## Subtitle C Proposal

Under the Subtitle C proposal, EPA would list CCR from electric utilities and independent power producers intended for disposal in landfills and surface impoundments as a special waste. This listing would subject CCR to existing Subtitle C regulations that apply to hazardous waste. Those regulations prohibit the siting of new disposal units in certain areas (*e.g.*, floodplains, seismic impact zones). They also require groundwater monitoring at disposal units and require owners and operators to take corrective actions to achieve compliance with groundwater protection standards. The regulations impose closure and post-closure care requirements that extend for thirty years after closure. They also require that owners and operators post financial assurance that is adequate to cover the estimated costs of required closure and post-closure care. And they require that owners and operators obtain permits from EPA or from authorized states that incorporate these design and operating standards. Finally, the regulations impose significant requirements on generators and transporters of waste destined for disposal. For example, EPA specifically noted in its Subtitle C proposal that it “does not see a compelling reason to change the [existing] corrective action requirements,” which impose facility-wide corrective action on all solid waste management units from which there have been a release of a hazardous constituent.

## Briefing

In the majority of cases, EPA would subject CCR to the existing Subtitle C regulations without modification. However, EPA is proposing to use its authority to tailor the regulations to CCR in some instances. For example, EPA is proposing to require installation of a composite liner and leachate collection and removal system at CCR landfills and surface impoundments instead of the double liner and leachate system typically required. In addition, EPA is proposing to require that surface impoundments and landfills be managed in a manner that controls fugitive dust consistent with applicable requirements in the applicable State Implementation Plan or issued by EPA under Section 110 of the Clean Air Act. To ensure the stability of CCR surface impoundments, EPA is proposing requirements that would require facilities to conduct periodic inspections (every seven days) by trained personnel. Most significantly, EPA is proposing to impose treatment requirements on wet CCR (*i.e.*, dewatering) that would effectively phase out wet handling of CCR and disposal of CCR in surface impoundments within five years. Further, EPA is seeking comment on the workability of the existing variance process for alternative storage standards.

### Subtitle D Proposal

Under the Subtitle D proposal, CCR would remain classified as a non-hazardous waste. EPA would develop national minimum standards governing landfills and surface impoundments where CCR from electric utilities and independent power producers is disposed. The standards would not govern the generation, transportation, storage, or treatment of CCR. The standards would be based largely on the standards that EPA has developed for municipal solid waste landfills, and would include restrictions on location, design, operation, groundwater monitoring, closure, and post-closure care. EPA would promulgate alternative performance standards for several of the standards that consist of technical design requirements (*e.g.*, composite liner and leachate collection and removal system). These alternative performance standards would allow facilities the flexibility to deviate from specific criteria where the appropriate requirement is highly dependent on site-specific conditions. Because EPA lacks the authority to require that states implement a state permit program or to oversee state programs implementing Subtitle D regulations, EPA is proposing notice requirements that would require facilities to obtain professional certification that they are in compliance with the standards and to make public information that documents their compliance.

The standards would restrict placement of CCR landfills and surface impoundments in certain areas (*e.g.*, floodplains and seismic impact zones). Existing landfills and surface impoundments in certain of these areas would have to be closed unless they could meet more stringent safety requirements. The standards would

impose controls relating to run-on and run-off from the surface of facilities, discharges to surface waters, pollution caused by fugitive dust from landfills, and recordkeeping. They would require that a system of monitoring wells be installed at all new and existing CCR landfills and surface impoundments. As under the proposed Subtitle C regulations, new landfills and surface impoundments would be required to install a composite liner and leachate collection and removal system. Because EPA cannot impose treatment requirements under Subtitle D that would effectively phase out the wet handling of CCR as it has proposed to do under Subtitle C, wet handling of CCR could continue under Subtitle D as long as existing surface impoundments are retrofitted to meet proposed design standards. EPA is also considering a third option—the D prime option—under which existing surface impoundments would not have to retrofit, but could continue to operate for the remainder of their useful lives. In light of EPA’s commentary and cost-benefit analysis, however, the D prime option seems the least likely alternative to be chosen.

### Litigation Risks

Although the electric generation industry already faces common law toxic tort suits related to the management and disposal of CCR, it may face an even greater degree of litigation risk once EPA finalizes regulations governing CCR under RCRA. Under either the Subtitle C or Subtitle D proposal, power generators could face citizen suits demanding compliance with RCRA requirements and the abatement of “imminent and substantial endangerment[s] to health or the environment.” 42 U.S.C. § 6972(a). A RCRA citizen suit plaintiff is not required to allege past violations of substantive requirements, as it would be required to do under the Clean Air Act or the Clean Water Act. Instead, a plaintiff may allege, and then ask a court to order a defendant to avoid “imminent and substantial” harm in the future. Under the Subtitle D proposal, power generators would also face enforcement suits by states that implement EPA’s non-hazardous waste regulations. However, litigation risk would be greatest under the Subtitle C proposal because, in addition to citizen and state enforcement, EPA retains the authority to enforce its hazardous waste regulations, which apply not only to hazardous waste disposal, but also to the generation, transportation, storage, and treatment of hazardous waste.

Although EPA clarified that neither the Subtitle C nor the Subtitle D proposal would apply to the beneficial reuse of CCR, both proposals set the stage for significant litigation risk on the beneficial reuse issue. Although the dual proposal provides some guidance on what would qualify as a beneficial reuse—for example, the use has to provide a functional benefit—there is still uncertainty as to which uses would be considered beneficial and which uses would be considered disposal subject to regulation. Under the Subtitle

C proposal, CCR destined for disposal would be regulated from its inception to its disposition, while CCR destined for beneficial reuse would not be subject to any regulation. A power generator may have difficulty, however, proving that its CCR was destined for beneficial reuse, as opposed to disposal.

## Conclusion

Electric power generators that manage coal ash residuals face a potentially costly and complicated new regulatory regime and increased litigation risk under either of EPA's proposals.

Although EPA has not endorsed one proposal over the other, all indicators suggest that it prefers the more costly, complicated, and risk-increasing Subtitle C proposal. Electric power generators should begin assessing their risks (both regulatory and litigation-related) and preparing for possible imposition of either proposal. Comments on the proposals will be due to EPA within 90 days after publication in the Federal Register, which should be forthcoming.

---

If you have any questions regarding any matters discussed in this briefing, please contact any of the Winston & Strawn attorneys listed below or your usual Winston & Strawn contact.

### Charlotte

Nash E. Long III	<a href="mailto:nlong@winston.com">nlong@winston.com</a>	(704) 350-7733
Phoebe N. Coddington	<a href="mailto:pcoddington@winston.com">pcoddington@winston.com</a>	(704) 350-7782

### Chicago

Eleni Kouimelis	<a href="mailto:ekouimelis@winston.com">ekouimelis@winston.com</a>	(312) 558-5133
-----------------	--	----------------

### Washington, D.C.

Eric P. Gotting	<a href="mailto:egotting@winston.com">egotting@winston.com</a>	(202) 282-5776
John M. Holloway III	<a href="mailto:jholloway@winston.com">jholloway@winston.com</a>	(202) 282-5807
John Fehrenbach	<a href="mailto:jfehrenbach@winston.com">jfehrenbach@winston.com</a>	(202) 282-5925
Mary E. Wall	<a href="mailto:mwall@winston.com">mwall@winston.com</a>	(202) 282-5962
Elizabeth C. Williamson	<a href="mailto:ewilliamson@winston.com">ewilliamson@winston.com</a>	(202) 282-5747
Linda K. Leibfarth	<a href="mailto:lleibfarth@winston.com">lleibfarth@winston.com</a>	(202) 282-5649

---

*These materials have been prepared by Winston & Strawn LLP for informational purposes only. These materials do not constitute legal advice and cannot be relied upon by any taxpayer for the purpose of avoiding penalties imposed under the Internal Revenue Code. Receipt of this information does not create an attorney-client relationship. No reproduction or redistribution without written permission of Winston & Strawn LLP.*