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COAL ASH

The final Coal Combustion Residual Rule signed in December 2014 by EPA Administrator Gina McCarthy defers defining the economically useful material as either hazardous or non-hazardous solid waste under the Resource Conservation and Recovery Act. Richard Stoll of Foley & Lardner LLP discusses the events leading to the rule—the 2008 collapse of an impoundment dike at the Tennessee Valley Authority Kingston, Tenn., power plant—and the efforts by the EPA to develop a rule in the face of strong concerns from many quarters over the stigma of a hazardous waste designation. Stoll argues the uncertainties in the final rule will lead to a new round of rulemaking unless Congress intervenes.

EPA's New Coal Combustion Residuals Rule: A 745-Page Deferral With a 12,400-Ton Surprise

BY RICHARD G. STOLL

Another Environmental Protection Agency battle focusing on coal has recently ended—for now at least. While most recent coal warfare has been fought on Clean Air Act¹ fronts, this battle was fought on the fields of the Resource Conservation and Recovery Act.² The target is coal combustion residuals (CCR) generated by electric utilities.

The EPA's CCR rule will soon be published in the Federal Register.³ It has been a long time coming. The

flash point for the rulemaking—the Archduke Ferdinand moment—was the December, 2008 Tennessee Valley Authority (TVA) Kingston, Tennessee incident. TVA's ash pond dike ruptured and millions of gallons of coal ash and water spilled into the surrounding waters and land.

The Kingston spill received extensive press coverage, and it occurred just a few weeks after President Barack Obama was elected. Obama had nominated Lisa Jackson to be his EPA Administrator, and at her Senate con-

¹ 42 U.S.C. §§ 7401 *et seq.*

² 42 U.S.C. §§ 6901 *et seq.*

³ The pre-publication version signed by EPA's administrator (745 pp.) appears at <http://www2.epa.gov/sites/production/>

[files/2014-12/documents/ccr_finalrule_prepub.pdf](http://www2.epa.gov/sites/production/files/2014-12/documents/ccr_finalrule_prepub.pdf). Throughout this article, citations to page numbers of that document will be given as "Rule at p. ___." When the rule is published in the Federal Register, this article will be re-published to reflect the appropriate Federal Register page cites.

firmation hearing in January 2009, Jackson committed to take aggressive regulatory action to minimize the chances of similar occurrences in the future.

The EPA first proposed the rule in 2010, and issued three supplemental notices along the way.⁴ In 2013, because it was starting to look as though the EPA would take forever to issue a final rule, both industry and public interest groups secured a “citizens suit” federal court order forcing a deadline.⁵

Now that the rule is out, more battles are coming. In light of the intense and polarized advocacy during the rule’s development, both judicial review and attempts to amend RCRA are a virtual certainty. And remarkably, for the most pivotal issue of the battle, the EPA’s new rule simply kicks the can down the road—thus setting up a completely new round of rulemaking unless Congress intervenes.

Background

What are CCRs? Electric utility boilers that burn coal for fuel generate residues from the coal’s combustion—hence “coal combustion residuals.” The most prominent residues are fly ash, which is trapped by air pollution control equipment, and bottom ash, which collects in the boiler’s floor. The fly ash and bottom ash are together referred to as “coal ash.” Another prominent type of CCR is “scrubber sludge,” which is generated by boilers using wet limestone scrubbers for air pollution control.

What Happens to CCRs After They Are Generated? Historically, most CCRs have been disposed in either (i) surface impoundments (ponds) or (ii) landfills. While surface impoundments (such as the TVA Kingston pond) are usually located at the site of the utility generating the CCRs, landfills are often located off-site.

The trend over recent decades, however, is for CCRs to be beneficially used rather than disposed. Because of their physical/chemical properties, they can serve as substitutes for virgin raw materials. Common examples include use as an ingredient in portland cement manufacturing, as a component in concrete, as an ingredient in wallboard, and as roadbed in highway construction. In 2000, the EPA estimated that 23 percent of CCRs generated were used beneficially.⁶ EPA’s most recent estimate puts the number at approximately 48 percent.⁷

RCRA’s Split Personality—C Versus D

To understand what much of the fighting has been about, one needs to understand RCRA’s “C versus D”

⁴ The proposed rule appears at 75 Fed. Reg. 35,128, June 21, 2010. The three supplemental proposals, which the EPA called “Notices of Data Availability” (NODAs), were published at 75 Fed. Reg. 64,974 (October 21, 2010), 76 Fed. Reg. 63,252 (October 12, 2011), and 78 Fed. Reg. 46,940 (August 2, 2013).

⁵ After the Court granted plaintiffs’ relief in *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 2013 BL 299598, 77 ERC 2154 (D.D.C 2013), the EPA entered into a Consent Decree on Jan. 29, 2014, requiring final action by Dec. 19, 2014. Document 44-1, No. 1:12-cv-00523-RBW, U.S. District Court for the District of Columbia. EPA Administrator Gina McCarthy signed the pre-publication version of the rule on the Consent Decree’s deadline.

⁶ 65 Fed. Reg. 32,214, 32,217, May 22, 2000.

⁷ Rule, p. 94.

split. For the biggest guns have been aimed on one basic issue: Should CCR disposal be regulated under RCRA’s Subtitle C or Subtitle D?⁸ It makes a tremendous difference.

An oversimplified C versus D summary should suffice for explaining the battlefield setting. RCRA covers all “solid waste,” but its impact is dramatically different depending upon whether a material is “hazardous” or non-hazardous solid waste. For hazardous waste, Subtitle C establishes a “cradle-to-grave” regulatory program. EPA’s Subtitle C regulations impose costly controls over every phase of waste management (generation, transportation, treatment and storage as well as disposal), and are directly enforceable by EPA. Federal permits imposing detailed conditions are required.

Moreover, Subtitle C has a “facility-wide corrective action” kicker that is not contained in Subtitle D.⁹ When a Subtitle C landfill or impoundment is issued a RCRA permit, a comprehensive soil and groundwater assessment is required for the owner’s entire facility (going well beyond impoundments and landfills) and the owner must remediate to EPA’s satisfaction any contamination found. This kicker has always served as a major incentive for parties to avoid Subtitle C permitting.

For solid waste that is not hazardous, Subtitle D essentially leaves regulations and enforcement to the states under rules the EPA issues as “suggested guidelines.” State plans and state permits that may be developed under these guidelines are not enforceable by EPA, and states are not required to follow EPA’s guidelines in any event. There is no “cradle-to-grave” coverage—only the grave (disposal) is addressed. Even if states followed all the suggestions in the EPA’s Subtitle D guidelines, the costs and burdens of compliance would be far less than those imposed under federal Subtitle C.

Over the years, EPA’s regulatory attention under RCRA has focused overwhelmingly on hazardous wastes. For one illustration, EPA’s Subtitle C rules currently occupy 1,472 pages in the Code of Federal Regulations. The EPA’s Subtitle D rules occupy 138.

One wrinkle will be discussed in more detail below. Disposal sites failing to meet criteria the EPA issues under Subtitle D are deemed “open dumps,” and RCRA provides for “citizen suit” enforcement against open dumps in federal court.

The Stigma Concern

Much of the “C versus D” fight has centered on the “stigma” concern. Beneficially used CCRs can serve as an effective—and more economical—substitute for virgin materials. The chemical and physical characteristics of beneficially used CCRs are no different than the chemical and physical characteristics of CCRs that are disposed—it’s exactly the same stuff. In fact, over the years, much of the CCR that is beneficially used has been taken from impoundments or landfills where CCR was initially disposed. Thus, if the EPA were to regulate disposed CCRs as Subtitle C hazardous waste, the result would be that CCRs beneficially used would be ex-

⁸ RCRA §§ 3001-3024, 42 U.S.C. §§ 6921-6939g (Subtitle C); RCRA §§ 4001-4010, 42 U.S.C. §§ 6941-6949a (Subtitle D).

⁹ RCRA § 3004(u), 42 U.S.C. § 6924(u).

actly the same stuff that the EPA regulates as hazardous waste.

The EPA has consistently said that no matter how it might regulate CCR disposal, it would exclude beneficially used CCRs from regulation because they do not present the same environmental risks of CCRs placed in ponds and landfills. But combatants have argued that even if exempt from regulation, if CCR disposal were regulated under Subtitle C, CCRs destined for beneficial use would be infected with the “hazardous waste” stigma.

This is because beneficially used CCR would be exactly the same stuff that is a hazardous waste when disposed. Potential users’ concerns over potential environmental harm and liability would be obvious, and parties selling the virgin materials for which CCRs substitute would be sure to tout this stigma to customers. Thus, these combatants have argued that the stigma would result in greatly reduced beneficial use of CCRs, and would—as a corollary—stretch already limited CCR disposal capacity.

Who Are the Combatants?

At least four types of parties have been engaged in the battle: (1) electric utilities and other parties who own and operate CCR surface impoundments and landfills; (2) companies engaged in the beneficial use of CCRs; (3) state and local governments; and (4) public interest groups.

For the premier issue (C versus D), owners and operators of CCR impoundments and landfills fought for D, in large part because of the stigma effect of hazardous waste and the impact the stigma would have on disposal capacity. Companies engaged in CCR beneficial use fought for D because of the stigma’s effect on their business. States favored D because they felt they could responsibly regulate CCRs without federal interference. Public interest groups fought for C because CCR disposal practices would be more tightly controlled with federal enforcement and federal permits.

Who Won?

For the C versus D issue, the winners (for now) are the advocates for D (industry, beneficial users, states). The final rule is a RCRA Subtitle D rule, so (for now) disposed CCRs are not hazardous waste and the feared stigma has been avoided.

As shown in recent comments and testimony, however, the “victors” have significant concerns over the implementation of the rule and the uncertainty regarding changes of course in the future (as described further below).

Stages of Rule’s Development

1976 to the 2000 ‘Bevill Determination.’ After RCRA became law in 1976, the EPA struggled over the appropriate way to regulate CCRs and other materials it called “high volume, low toxicity” wastes. The EPA initiated a process to regulate these wastes as “special wastes” under Subtitle C. But Congress, at industry’s urging, intervened.

In 1980, Congress added the “Bevill amendment” to RCRA¹⁰ providing that the EPA could not regulate CCRs (and other “high volume, low toxicity” wastes) under Subtitle C unless and until the EPA performed certain studies and made certain findings. Among the factors to be considered were the material’s risks to health and the environment, the adequacy of state laws to control any such risks, and the “current and potential utilization” of CCRs.

In 2000, after intense advocacy from all sides, the EPA completed the Bevill process for CCRs under Administrator Carol Browner.¹¹ In her “Bevill Determination,”¹² Browner concluded that regulation of CCRs under Subtitle C was unwarranted. She based her decision primarily on the bases that (1) risk assessments showed that state regulations implemented under Subtitle D should suffice to protect health and the environment and (2) treating disposed CCRs as a Subtitle C waste could produce a stigma placing “unnecessary barriers on the beneficial uses of these wastes.” She stressed—focusing on the “current and potential utilization” statutory factor—that beneficial uses of CCRs “conserve natural resources, reduce disposal costs and reduce the total amount of wastes destined for disposal.”¹³

From 2000 to the 2010 Proposal: ‘Inter-Agency Review’ Plays a Pivotal Role. Public interest groups were distressed with Browner’s 2000 decision and during the next few years conducted advocacy of all types seeking to force a turnaround. They demanded a new Bevill Determination that would impose the stronger disposal controls provided by Subtitle C. They also expressed concerns that in some cases, CCRs were being placed on land for alleged beneficial use purposes while these activities were—in their view—actually dumping in disguise with the same risks posed by CCR landfills.

By late 2008, it appeared the public interest groups’ stars were in alignment: (1) newly elected President Obama had campaigned for tough approaches to environmental regulation; (2) the new EPA Administrator Jackson was known to favor tough approaches; and (3) the TVA Kingston dike broke.

In 2009, Administrator Jackson made development of a new CCR rule a high priority and EPA staff began working on a proposed rule. What was nonpublic (but common) knowledge then, and can now be confirmed through the record, is that Jackson wanted to reverse Browner’s Bevill Determination and impose a Subtitle C rule. The federal “inter-agency review” process intervened, however, in a highly significant manner.

EPA rulemaking—like most federal agencies’ rulemaking—is under the control of the White House. For many years, this control has been managed by the Office of Management and Budget and more particularly, the Office of Information and Regulatory Affairs within OMB. An OIRA process for “inter-agency re-

¹⁰ RCRA §§ 3001(b)(3)(A)(i), 8002(n); 42 U.S.C. §§ 6921(b)(3)(A)(i), 6982(n).

¹¹ The EPA had initially issued a Bevill Determination for CCRs in 1993 concluding that Subtitle C coverage was unwarranted but that more study was needed. 58 Fed. Reg. 42,466, August 9, 1993.

¹² 65 Fed. Reg. 32,214 *et seq.*, May 22, 2000.

¹³ *Id.* at 32,232-33.

view” has been formalized under Executive Order 12,866, as issued by President Bill Clinton.¹⁴

For any “significant” rule, federal agencies must go through an OIRA approval process at both the proposed and final stages. OIRA staff weigh in on the draft provisions, and any other federal agency with an interest in a draft may weigh in. Interested parties (industry, states, public interest groups) are permitted to conduct advocacy before OIRA on agency rules, and they often do.

So the EPA’s administrator does not always get what she or he wants in rulemakings. OIRA may decide based on its own personnel’s views, or based on views of other federal agencies, to force minor or major changes in a rule. OIRA may even decide to reject a rule outright or significantly delay it.

Most EPA rules make it through this process with little if any trouble. But almost every year, there are notable exceptions. One well-known example is the White House refusal to allow Jackson to proceed with a new CAA ambient air standard for ozone before the 2012 elections.¹⁵ The proposed CCR rule that the EPA issued in 2010 is another notable example.

The 2010 Proposed CCR Rule(s)

EPA staff had drafted a proposed rulemaking package that would through a revised Bevill Determination regulate CCR disposal under Subtitle C. The EPA submitted its Subtitle C draft for OIRA review on October 16, 2009.¹⁶ By the time the OIRA process ended, however, the proposed rule published in the Federal Register of June 21, 2010 was a “co-proposal.”¹⁷

After intense efforts by industry and beneficial use companies—which were strongly supported by several federal agencies—the EPA was forced to issue a “neutral” proposal in which both a Subtitle C and a Subtitle D option were presented for public comment. Stigma was the primary argument that appeared to carry the day in forcing the EPA to abandon its C-only proposal.¹⁸

The stigma issue was front-and-center in the 2010 proposed rule preamble. While Administrator Browner

fully embraced this concern in her 2000 Bevill Determination, the 2010 EPA apparently did not. The EPA’s proposed rule preamble reflected a healthy dose of skepticism that the stigma fears were well-founded. In its proposal, the EPA in essence challenged parties raising the stigma concern to prove their fears with “data” because the EPA could not otherwise “quantify” the alleged effect.¹⁹

The state of the 2009-2010 EPA’s concern over stigma is bluntly revealed in the initial (October 2009) C-only draft that the EPA had submitted to OIRA. In a passage recognizing that EPA’s 2000 Bevill Determination was based on a strong concern over the stigma effect on beneficial use, EPA’s 2009 draft stated: “On reconsidering this issue, the EPA is now of the view that the stigma concern will not result in the *total* collapse of the recycling of these materials.”²⁰

The EPA crafted the C portion of the June 2010 proposal by labeling CCR waste as a “special” waste. EPA’s theory was that avoiding coupling the adjective “hazardous” directly with the noun “waste” in the Subtitle C regulatory language “could, in large measure, address potential issues of stigma.”²¹

The use of the word “special” did absolutely nothing to assuage the stigma fears of the industry parties, however. Advocates argued that because the EPA’s authority under Subtitle C is clearly limited to “hazardous” waste, beneficially used CCRs would still be exactly the same stuff as material regulated as Subtitle C hazardous waste. Virgin materials for which CCRs can substitute would not be similarly tarred, and the use of the word “special” in Subtitle C would not hoodwink potential CCR users—especially when companies selling materials for which CCRs can substitute would be sure to trumpet this point in the marketplace.

In both the C and the D portions of the proposal, the prescribed operational controls for impoundments and landfills (regarding engineering and monitoring measures to protect health and the environment) were quite similar. And in both the C and D portions, the EPA said it would exempt legitimate beneficial uses from any controls.

The EPA did raise concerns over “large-scale” beneficial use placements of CCRs directly on the land, however. The EPA recognized public interest groups’ concerns that some such placements could possibly be deemed disposal in disguise, and could present similar environmental concerns to CCR landfills. Examples cited by public interest groups were use of CCRs to construct a golf course and to reclaim gravel pits and quarries.

The EPA solicited comment on this issue, but its proposed rule language dealt only generally with it. The Subtitle C proposed regulatory language provided that “large scale fill projects, such as for restructuring the landscape,” would not qualify as a beneficial use.²² Both the C and D proposed regulatory language provided that a regulated “CCR landfill” would include

posal’ and ‘beneficial use’ will be lost on a public hearing the words ‘hazardous waste.’ ”

¹⁹ 75 Fed. Reg. at 35,158.

²⁰ EPA-HQ-RCRA-2009-0640-0013 at p. 88, emphasis added.

²¹ 75 Fed. Reg. at 35,174.

²² 75 Fed. Reg. 35,128 at 35,254, June 21, 2010.

¹⁴ 58 Fed. Reg. 51,735, October 4, 1993. President Obama issued amendments to Exec. Order 12,866 through Exec. Order 13,563, 76 Fed. Reg. 3821, Jan. 21, 2011, but the review process remains essentially the same.

¹⁵ Statement by the President on the Ozone National Ambient Air Quality Standards, September 2, 2011. <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards>.

¹⁶ The original Subtitle C draft appears in the http://www.regulations.gov/rulemaking_docket_at_EPA-HQ-RCRA-2009-0640-0013.

¹⁷ 75 Fed. Reg. 35,128.

¹⁸ Comments of several federal agencies opposed to Subtitle C because of stigma concerns appear in the rulemaking docket at EPA-HQ-RCRA-2009-0640-0263, -0349 (at <http://www.regulations.gov>). The Bureau of Reclamation and the Department of Transportation were particularly concerned about the effects on use of fly ash in concrete. The Department of Energy predicted the Subtitle C stigma would “cause significant harm” to the industry. A particularly poignant comment was offered by the Department of Agriculture (concerned about curtailing the beneficial use of CCRs as an agricultural soil amendment): “What farmer would want to apply ‘hazardous waste’ to his fields? What will corporate liability lawyers tell companies about creating wallboard for use in homes out of ‘hazardous waste?’ The distinction between ‘intended for dis-

“piles” and “large scale fill operations.”²³ The EPA did not propose—either in the regulatory or preamble language—how to define “large scale” or “pile.”

The Final 2015 Rule—A ‘Deferral’ With Stigma Declared ‘Moot’

As explained above, the stigma issue was front-and-center in the 2010 proposed rule, just as the issue has always been the primary driver in the C versus D battle. So how many times does the word “stigma” appear in the new final rulemaking package? Just *one* time.

The only place in the entire 745-page document that the word appears is where the EPA generally summarizes the basic comments it received, and notes that industry had argued that the “stigma associated with regulating the disposal of CCR as hazardous waste would ‘cripple’ the current beneficial reuse market.”²⁴

Yet in the 2015 CCR rule preamble, the EPA never responds to the “cripple” comment or to the thousands of pages of public comments devoted to the stigma issue. Rather, the EPA states: “Since EPA is promulgating this regulation under subtitle D, the concerns over the potential effect of a subtitle C regulation on beneficial use are moot.”²⁵

So if stigma was not among the factors driving the EPA’s decisionmaking, on what basis did the agency decide to issue the final rule under Subtitle D rather than Subtitle C? Recall the emphasis placed above on the battle being over “for now” and that the winners “for now” are the advocates for Subtitle D.

This is because the bottom line to the resolution of the C versus D issue is, as the EPA explains at great length in its final rule preamble, “deferral.” Even though the EPA has been gathering data and information relating to CCR disposal for almost 40 years, the agency says that “critical information necessary to a final Regulatory Determination is still lacking.”²⁶ The EPA then explains:

This [“lacking”] information bears directly on the extent and magnitude of the risks over the course of the next several years, and the degree to which those risks can be managed sufficiently under each of the two regulatory structures available to the agency. In the absence of this information, the EPA is unable to reach a conclusion on the issue that is central to a Bevill Determination—whether the risks presented by management of CCR waste streams can only be adequately mitigated through regulation under RCRA subtitle C.²⁷

So when might the EPA be able to “reach a conclusion” on whether to regulate CCR disposal under Subtitle C? In other words, how long will the can be kicked down the road with the new “final” rule being only temporary? The EPA doesn’t answer this question in its final rulemaking package. Neither does the EPA address this issue in the fact sheet or the “frequently asked questions” materials it released with the final rulemaking package.²⁸ In fact, neither the fact sheet nor the FAQs even mention that the EPA has deferred

²³ *Id.* at 35,240, 35,255.

²⁴ Rule at p. 56.

²⁵ Rule at 596.

²⁶ Rule at 58-59.

²⁷ *Id.*

²⁸ See <http://www2.epa.gov/coalash/coal-ash-rule>.

its decision on how to regulate CCR disposal under RCRA.

But recall from above that the EPA issued this rule under a court-ordered deadline in the 2013 *Appalachian Voices* case, where public interest groups and CCR beneficial use companies had sued to force the EPA to complete its then-pending rulemaking.²⁹ In that case, the judge ruled that RCRA § 2002(b) requires the EPA to review its existing rules and revise them where necessary every three years. It thus appears that public interest groups could attempt to force the EPA into another court-ordered deadline to complete review of the new CCR rules by 2018.³⁰

Is Stigma Still on EPA’s Radar Screen?

So we have a strange sequence of events in the life of the stigma concern. Recall that stigma was a pivotal factor in Browner’s 2000 Bevill Determination. But since then, we have seen the following:

a. the original draft CCR proposal (2009) submitted to OIRA by Jackson’s EPA proposed Subtitle C coverage, and the EPA was then satisfied with the conclusion that Subtitle C for CCR disposal would not “result in the total collapse” of the beneficial use market;

b. the 2010 proposal (forced upon the EPA through inter-agency review) was full of solicitations for comment on the stigma issue, though the EPA appeared skeptical that the stigma fears were valid;

c. parties commenting on that proposal devoted thousands of pages to the stigma issue;

d. in the final rule, the EPA recognizes that parties commented on the issue, but says that the issue is “moot” because the rule is a Subtitle D rule;

e. in explaining the issues it still needs to address to reach its “conclusion” for a final Bevill Determination, the EPA mentions only (i) health/environmental risk and (ii) adequacy of State programs—the EPA says *nothing about stigma*.

It thus appears that over the last 15 years, in EPA’s view, the stigma concern may have been transmogrified from pivotal to irrelevant. Only time will tell whether it may be resurrected.

Enforcement Through ‘Citizens Suits’ Only

The new rule—even though temporary—sets forth lengthy and detailed requirements for both surface impoundments and landfills receiving CCRs. Tables 1 and 2 in EPA’s preamble³¹ (appearing as an attachment to this article below) provide a good summary of the types of requirements and the deadlines for achieving them. Generally, the types of requirements are:

²⁹ See note 5 above.

³⁰ While the *Appalachian Voices* court ruled that the three-year review requirement did not apply to the Bevill determination provision itself, the public interest groups could at least try to argue that implicit in the review of the current Subtitle D rules is whether they are adequate to protect health and the environment—thus forcing a review of the Bevill Determination through the back door.

³¹ Rule at pp. 462-64.

location restrictions,
 air criteria,
 run-on and run-off controls,
 inspections,
 groundwater monitoring and corrective action,
 closure and post-closure care, and

recordkeeping, notification and Internet requirements.

The new rule also includes detailed provisions defining “beneficial use” of CCRs and setting conditions on what types of beneficial uses are deemed exempt. A few highlights of the new requirements are presented below, but first it is important to describe the function these provisions perform in the regulatory/enforcement setting.

In several sections of its final rulemaking preamble³² The EPA stresses the following points, all flowing from the fact that the new rule is issued under Subtitle D:

a. The EPA has no authority to enforce these requirements.

b. States are not required to enforce these requirements.

c. States are not required to adopt rules based on the new federal rule (or for that matter, to adopt any new rules at all).

d. States may (solely on their own volition) adopt state rules based on the new federal rule and may (on their own volition) submit the state rules to the EPA for review and approval.

e. Even if the EPA approves any such state rules, the EPA still cannot enforce any requirements in those rules and cannot require states to enforce them.

The EPA *encourages* states to adopt their own new rules patterned after the new federal rule.³³ But there are no sanctions that the EPA can impose upon any state choosing to do nothing. At this point, some sources are saying many states may do nothing, which is understandable since this “deferral” rule is not EPA’s final decision.

So why are parties subject to the terms of the rule spending time and resources trying to understand its provisions and preparing to comply with it? As the EPA explains further in the preamble,³⁴ certain provisions in RCRA Subtitle D provide that any disposal facility failing to meet criteria the EPA has included in its Subtitle D guidelines will be deemed an “open dump.” These Subtitle D sections go on to provide that the RCRA “citizens suit” provision (§ 7002) may be used to force open dumps to close or upgrade (§ 4005(a)).

Thus, the EPA explains, plaintiffs (including individuals, public interest groups, and states) may bring actions under RCRA § 7002 in federal district courts to enforce the terms of the new rule against alleged violators. The rule’s regulatory language makes it quite explicit that violations of the rule’s requirements are “open

dumping.”³⁵ To facilitate this citizens’ suit enforcement, the rule requires affected facilities to maintain a publicly accessible Internet site that citizens and states can use to monitor each facility’s compliance status.³⁶

Key Scope and Applicability Provisions of New Rule

CCRs From Electric Utilities Only. Many types of facilities (industry, universities, hospitals, municipalities) combust coal in boilers and generate CCRs. This rule, however, applies only to CCRs generated by electric utilities and independent power producers.³⁷ The EPA says it will “decide on an appropriate course of action for CCRs from non-utility boilers” at some unspecified time in the future.³⁸

Coal Mine-Filling Exempt. Large volumes of CCRs have been used to fill surface and underground coal mines. The EPA exempts this activity from the new rule,³⁹ and explains that the federal Office of Surface Mining (OSM) will be conducting a rulemaking to address these practices.⁴⁰ The latest reports indicate the OSM may issue a proposed rule by mid-2015.

Municipal Solid Waste Landfills (MSWLFs) Exempt. The rule does not apply to placement of CCRs in or on MSWLFs.⁴¹

No ‘Cradle to Grave.’ The rule does not regulate the generation or transportation of CCRs. It only applies to disposal. (NOTE, however: that the EPA has deemed some forms of “storage” on land to be disposal and subject to regulation. See the beneficial use discussion below.)

Surface Impoundments, Landfills, Covered. The two basic types of units receiving CCRs that are covered by the rule are “CCR surface impoundments” and “CCR landfills.”⁴² The principal difference is that impoundments are ponds into which CCRs are “sluiced” with water, whereas landfills receive dry CCRs only.

Sand & Gravel Pits and Quarries Covered. Placement of CCR in sand and gravel pits and quarries is considered placement into a “CCR landfill” and would be subject to all of the performance standards applicable to landfills.⁴³

Grandparenting. The rule’s effective date will be 180 days after the rule is published in the Federal Register—thus most likely in September or October 2015. This does not mean, however, that impoundments and landfills must be in compliance with all of the operational requirements (location restrictions, run-on, run-off etc.) by that date. Tables 1 and 2 (reprinted below) show the compliance schedules extending for several years. Rather, the effective date operates primarily to establish

³⁵ § 257.1(a), Rule at p. 607.

³⁶ § 257.107, Rule at p. 737.

³⁷ § 257.50(b), Rule at p. 611.

³⁸ Rule at p. 134.

³⁹ § 257.50(h), Rule at p. 612.

⁴⁰ Rule at p. 137.

⁴¹ § 257.50(i), Rule at p.612.

⁴² §§ 257.50(b), 257.53., Rule at pp. 611, 615.

⁴³ *Id.*

³² See discussions beginning at Rule pp. 25 and 464.

³³ Rule at p. 465.

³⁴ Rule at pp. 24-25.

a cut-off for various units and activities seeking to escape coverage.

Interested parties are finding ambiguities in some of these cut-off provisions that will hopefully be clarified by further guidance from EPA, but here are the provisions in general:

a. Landfills that cease receiving CCRs before the effective date are exempt. Unlike surface impoundments (see immediately below), landfills do not have to be “closed” by the effective date to escape coverage.⁴⁴

b. Surface impoundments that are “closed” before the effective date are exempt. EPA’s preamble states that a unit is closed if it no longer contains water and—if CCRs remain in the unit—the unit can no longer impound water because it is capped. If all CCRs are removed from the unit by the effective date, the unit would be considered closed.⁴⁵

c. Surface impoundments that are not closed by the effective date may still qualify for more lenient treatment if they are deemed “inactive.”⁴⁶ Surface impoundments that cease receiving CCRs before the effective date are considered inactive. If such a surface impoundment then closes before three years from the effective date, it will be exempt from all other requirements of the rule (groundwater monitoring, etc.).⁴⁷ The degree of closure necessary to secure this exemption (i.e., “how closed is closed”?) is somewhat ambiguous at this stage.

d. Landfills and surface impoundments located at facilities that cease producing electricity before the effective date are exempt.⁴⁸

e. Any beneficial use activity that might otherwise be covered by the rule (see below) that ceases before the effective date is exempt.

Beneficial Use: A 12,400-Ton Surprise

The EPA stated many times in the 2010 proposed rule and states many times in the preamble to the new final rule that beneficial use of CCRs is not regulated. But there is a catch: an activity or practice must meet the new regulatory definition of “Beneficial use of CCR” in order to be exempt, and the definition imposes conditions.

The rule divides the beneficial use world into two basic categories: encapsulated and unencapsulated uses. “Encapsulated” means a use that binds the CCR into a solid matrix that minimizes its mobilization into the surrounding environment.⁴⁹ “Unencapsulated” isn’t defined, but the EPA is generally targeting uses where CCR is placed directly on the land (such as roadbed construction, soil amendment for agriculture, and structural fill).

The EPA includes an extensive discussion of the “Beneficial Use of CCR” definition in its preamble.⁵⁰

Three conditions apply to both encapsulated and unencapsulated uses:⁵¹

(1) the CCR must provide a functional benefit;

(2) the CCR must be used as a substitute for a virgin material;

(3) the CCR must meet relevant product specifications, regulatory standards, or design standards where available, and where such standards are not available, the CCR must not be used “in excess quantities.”

The EPA says that it expects the most common types of encapsulated uses—such as cement, concrete, and wallboard—to easily meet these conditions. So far, these conditions appear to be causing little concern or confusion among regulated parties, although it is not particularly clear how one might determine whether a quantity used is “excess.” The following preamble explanation doesn’t help a whole lot: “i.e., greater than necessary for a specific project.”⁵²

A provision relating to unencapsulated uses is causing significant concern and confusion, however. As noted above, in the proposed rule, the EPA had discussed potential risks from “large scale” placements of unencapsulated CCRs for “fill” projects. The EPA referred to projects involving large volumes of CCR to “restructure” or “re-grade” the landscape, such as occurred at a golf course in Virginia, and placement in quarries and sand and gravel pits, such as occurred at a Maryland site.⁵³ The EPA did not, however, propose to define “large scale” with any numeric cutoff or in any other manner.

But surprise! The final rule defines placements of 12,400 tons or more of unencapsulated CCRs upon the land as a “CCR landfill”—subject to all of the rule’s myriad requirements for CCR landfills—unless the placement satisfies not only the three conditions above but also the following condition⁵⁴

When unencapsulated use of CCR involving placement on the land of 12,400 tons or more in non-roadway applications, the user must demonstrate and keep records. It also must provide such documentation upon request, that environmental releases to groundwater, surface water, soil and air are comparable to or lower than those from analogous products made without CCR, or that environmental releases to groundwater, surface water, soil and air will be at or below relevant regulatory and health-based benchmarks for human and ecological receptors during use.

“Roadway” placements and smaller scale (12,400 tons or less) placements on land are required to meet only the same three conditions required for encapsulated uses.⁵⁵

The EPA includes extensive discussion of how this “demonstrate/document” condition—which was never proposed—is supposed to be met in the final rule preamble.⁵⁶ It appears from this discussion that the EPA contemplates an exhaustive and expensive effort. The documentation is not required to be submitted to the EPA or any other agency for approval, however. Rather,

⁴⁴ § 257.50(d), Rule at p. 612.

⁴⁵ Rule at pp. 146-47.

⁴⁶ § 257.53, Rule at p. 619.

⁴⁷ § 257.100, Rule at p. 698, and see discussion at Rule pp. 388-89.

⁴⁸ § 257.50(e), Rule at p. 611.

⁴⁹ § 257.53, Rule at p. 616.

⁵⁰ This discussion begins at Rule p. 160.

⁵¹ § 257.53, Rule at p. 614.

⁵² Rule at p. 161.

⁵³ See notes 22-23, *supra*.

⁵⁴ § 257.53, Rule at pp. 614-15.

⁵⁵ *Id.*

⁵⁶ See discussion starting at Rule p. 185.

the party engaging in such activity is required to retain such documentation and provide it to agencies (and presumably the public) “upon request.”⁵⁷

It is too early to know whether these new, unproposed provisions will cause much heartburn for regulated parties. They are already causing concern, however, for companies engaging in unquestionably legitimate encapsulated use, but who store CCR on the ground immediately prior to engaging in that encapsulated use.

This concern is arising from a preamble statement in the final rule that says that *even temporary storage* on land prior to an encapsulated use (such as a cement facility storing CCRs for use as an ingredient) is subject to the 12,400-ton surprise.⁵⁸ That is, if more than 12,400 tons of CCR ingredient is being stored on the land (which is apparently often the case), the storage is “disposal” and would make the facility fully subject to the “CCR landfill” provisions unless the facility satisfies the “demonstrate/document” requirements that were never proposed. Application of these conditions to storage before encapsulated use is even more surprising in light of EPA’s proposed rule preamble focus on “large scale” placements in the context of “fill” projects for “restructuring” or “re-grading” the landscape.⁵⁹

Parties awakening to this surprise are being further confused by preamble statements indicating that “contained” CCR storage would not constitute disposal, even in quantities exceeding 12,400 tons. The EPA states that “contained” does not necessarily mean totally contained within silos or tanks, but fails to explain just how “contained” the material must be to be considered “contained” enough to escape being considered disposal.⁶⁰

This entire “demonstrate/document” issue will inevitably be subject to many requests for clarification and guidance from potentially affected parties. It may also be especially vulnerable on judicial review, as it was never proposed.

Perhaps anticipating this vulnerability, the EPA stresses that it solicited comments on how to address large-scale fill activities and received many suggestions from commenters.⁶¹ But as the EPA correctly states in another section of the preamble: “Under the Administrative Procedure Act, the public must be given the opportunity to comment on not only the information that would support such an action but also EPA’s evaluation of that information and the reasoning behind the agency’s decision.”⁶²

The EPA only now for the first time in its final rule preamble explains how it evaluated certain information and how it arrived at the 12,400 ton cutoff level and developed the “demonstrate/document” requirements. The public was never given the opportunity to comment on the EPA’s evaluation of information, nor on its reasoning.

Judicial Review? Of Course

RCRA provides for direct judicial review of EPA’s final rules in the U.S. Court of Appeals for the D.C. Cir-

⁵⁷ § 257.53, Rule at pp. 614-15.

⁵⁸ Rule at p. 195.

⁵⁹ See notes 22-23, *supra*.

⁶⁰ Rule at p. 194.

⁶¹ Rule at pp. 176-77.

⁶² Rule at pp. 135-36.

cuit (§ 7006), and that petitions for review must be filed within 90 days of the rule’s publication. Thus, the deadline is likely to fall in June or July 2015.

These days, for any major final EPA rule issued after vigorous advocacy from competing sides, the following scenario is just as certain as death and taxes:

(1) industry parties will seek judicial review over provisions they deem too stringent (or un-proposed, like the 12,400-ton surprise);

(2) public interest parties will seek judicial review over provisions they deem not stringent enough;

(3) the industry parties will separately intervene on EPA’s behalf to defend against the public interest parties’ arguments; and

(4) the public interest parties will separately intervene on EPA’s behalf to defend against the industry parties’ arguments.

To add to the mix, various states are likely to seek judicial review and intervene. In recent years on major EPA rules, Red States have tended to support industry’s arguments and Blue States have backed public interest groups arguments. On this CCR rule, however, it appears that the states were fairly unanimous in supporting Subtitle D so the Red-Blue split might not surface. As the EPA characterized it, state and local government opposition to Subtitle C was “overwhelming.”⁶³

There are many possible outcomes to the judicial review process. Ultimately, the court could decide to uphold the rule in its entirety or reject the rule in its entirety. More likely, the court might reject specific provisions of the rule. The court’s rejection (in whole or part) can take two forms: The court may “vacate” the rule or provision or alternatively “remand without vacating” a rule or provision. Whatever is vacated is wiped off the books—there will be nothing to enforce unless and until a new provision replaces it. When a provision is merely remanded, the provision remains in full force and effect but the EPA is compelled by the court either to replace the remanded provision in the future or provide a better explanation of its basis and purpose.

The judicial review process will take a while. Based on the usual course for other complex cases with multiple parties involving EPA rules in the D.C. Circuit, it is difficult to see a decision coming out of the Court during calendar 2015.

Legislative Action in Congress?

Recall the earlier discussion on “victors” not entirely happy with the situation. As reported by Bloomberg BNA,⁶⁴ in recent congressional testimony focusing on the new rule, industry complained that EPA’s “deferral” because of “inability to reach a conclusion” creates major regulatory uncertainty. As industry noted, the EPA could turn around in a year or two and regulate CCR disposal under Subtitle C.

The industry also expressed concerns that the rule’s “citizens-suit only” approach would result in confusingly inconsistent application of the rule throughout the U.S., as numerous federal district judges could easily

⁶³ Rule at p. 595.

⁶⁴ House to Push Coal Ash Legislation to Address Lingering Regulatory Uncertainty (15 DEN A-6, 1/23/15).

interpret the rule's often-ambiguous requirements differently. The industry also pointed out that interpretation of RCRA rules requires the technical expertise of state and federal regulators that federal judges do not possess.

During the rulemaking battle over C versus D, the House of Representatives passed RCRA amendments that would address these industry concerns by "locking in" Subtitle D status for CCRs and by providing direct enforcement and permitting authority to the States with EPA backup authority under Subtitle D.⁶⁵ With the Senate in Democratic control throughout this period, however, the House bill never became law.

According to this same BNA Bloomberg report, key Republican leaders in the House have vowed to push forward with similar legislation this year. Many observers feel that with the flip of Senate control to Republi-

⁶⁵ The most recent version that passed the House is H.R. 2218, which passed on July 25, 2013. <https://www.congress.gov/bill/113th-congress/house-bill/2218>.

cans, the chances of a Subtitle D for CCR bill making its way to the White House are now more favorable.

Of course, a presidential veto is always a possibility and the question might then become whether a bill could pass both chambers with sufficient votes to override. At least according to recent congressional testimony from EPA's top RCRA official, it appears that the administration does not endorse efforts to amend RCRA to address CCRs.⁶⁶

Now that the new final CCR rule has been issued, it will be interesting to see whether and to what extent any new legislation will be tailored in light of the terms of the rule. Congress could, for instance, embrace the new rule in toto. But equally likely, the legislation would include language that would negate, significantly alter, or supplement the rule's provisions. This could make things quite confusing, as the effective date for the new rule is likely to kick in before any legislation could be finalized.

⁶⁶ Note 64, *supra*.

Table 1. Implementation Time Frames for the Minimum Criteria for Existing CCR Surface Impoundments

Requirement	Implementation Timeframe (Number of Months after Publication of Rule)	Description of Requirement to be Completed
Location Restrictions (§ 257.60-§ 257.64)	42 months	- Complete demonstration for placement above the uppermost aquifer Complete demonstrations for wetlands, fault areas, seismic impact zones, and unstable areas
Design Criteria (§ 257.71)	18 months	- Document whether CCR unit is either a lined or unlined CCR surface impoundment
Structural Integrity (§ 257.73)	8 months 18 months	- Install permanent marker - Compile a history of construction, complete initial hazard potential classification assessment, initial
	24 months	structural stability assessment, and initial safety factor assessment - Prepare emergency action plan
Air Criteria (§ 257.80)	6 months	- Prepare fugitive dust control plan
Hydrologic and Hydraulic Capacity (§ 257.82)	18 months	- Prepare initial inflow design flood control system plan
Inspections (§ 257.83)	6 months 6 months 9 months	- Initiate weekly inspections of the CCR unit - Initiate monthly monitoring of CCR unit instrumentation - Complete the initial annual inspection of the CCR unit
Groundwater Monitoring and Corrective Action (§ 257.90-§ 257.98)	30 months	- Install the groundwater monitoring system; develop the groundwater sampling and analysis program; initiate the detection monitoring program; and begin evaluating the groundwater monitoring data for statistically significant increases over background levels

Table 1. Implementation Time Frames for the Minimum Criteria for Existing CCR Surface Impoundments –

Requirement	Implementation Timeframe (Number of Months after Publication of Rule)	Description of Requirement to be Completed
Closure and Post-Closure Care (§ 257.103–§ 257.104)	18 months	- Prepare written closure and post-closure care plans
Recordkeeping, Notification, and Internet Requirements (§ 257.105–§ 257.107)	6 months	- Conduct required recordkeeping - Provide required notifications - Establish CCR website

Table 2. Implementation Time Frames for the Minimum Criteria for Existing CCR Landfills

Requirement	Implementation Timeframe (Number of Months after Publication of Rule)	Description of Requirement to be Completed
Location Restrictions (§ 257.64)	42 months	- Complete demonstration for unstable areas
Air Criteria (§ 257.80)	6 months	- Prepare fugitive dust control plan
Run-On and Run-Off Controls (§ 257.81)	18 months	- Prepare initial run-on and run-off control system plan
Inspections (§ 257.83)	6 months	- Initiate weekly inspections of the CCR unit
	9 months	- Complete the initial annual inspection of the CCR unit
Groundwater Monitoring and Corrective Action (§ 257.90–§ 257.98)	30 months	- Install the groundwater monitoring system; develop the groundwater sampling and analysis program; initiate the detection monitoring program; and begin evaluating the groundwater monitoring data for statistically significant increases over background levels
Closure and Post-Closure Care (§ 257.103–§ 257.104)	18 months	- Prepare written closure and post-closure care plans
Recordkeeping, Notification, and Internet Requirements (§ 257.105–§ 257.107)	6 months	- Conduct required recordkeeping - Provide required notifications - Establish CCR website

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This article does not represent the opinions of Bloomberg BNA, which welcomes other points of view.