

Lawyer Insights

EPA's Expansion of Coal Ash Regulation Could Impact Beneficial Use

By Brent Rosser

Published in Power Magazine | October 2, 2023



The U.S. Environmental Protection Agency (EPA) in May of this year issued a proposed rule that would greatly expand the scope of federal regulations governing the management of coal combustion residuals, or CCRs. CCRs are produced from the combustion of coal in boilers (typically in the form of bottom ash or fly ash) and contain trace amounts of heavy metals. Historically, CCRs have been managed at power plants in onsite impoundments that are designed to treat the material.

In its proposed rule, the EPA proposes to regulate these CCR management facilities that were previously excluded from coverage under the EPA's prior CCR regulations, which were enacted in 2015. This includes facilities that the EPA characterizes as legacy CCR impoundments, and CCR management units.

CCR Legacy Impoundments and Management Units

As defined by the EPA, legacy impoundments are located at power plants that ceased generating power (that is, closed facilities) before October 2015, and which contained "CCR and liquids" on or after that date. CCR management units are defined as "any area of land" on which "any non-containerized accumulation of CCR is received, placed, or otherwise managed at any time," including landfills that closed before October 2015. According to the EPA, such CCR management units could include "any areas" where solid waste management of CCR on the ground has occurred, including "structural fill sites," "evaporation ponds," and "haul roads made of CCR if the use does not meet the definition of beneficial use."

Although the EPA projects that nearly 300 CCR facilities will be impacted by its proposal, the agency recognizes that it could be many more. For example, the EPA's proposal would require facilities to undertake extensive site evaluation to identify all legacy impoundments and CCR management units on their property. For CCR management units, this may require "exploratory soil borings" to "affirmatively rule out ... areas of potential CCR placement." Moreover, the EPA's proposal would require the facility to complete a report containing numerous categories of information, including "[a]ny record or knowledge of groundwater contamination associated with each CCR management unit" and a "discussion of any known spills or releases of CCR from each CCR management unit and whether the spills were reported to state or federal agencies."

Under the EPA's proposal, these previously unregulated CCR facilities would now be subject to groundwater monitoring, closure, and at least 30 years of post-closure care, among many other requirements. The EPA estimates that its proposal would result in costs of \$431 million/year to the industry, which the EPA acknowledges could result in higher electricity costs for consumers. Although the

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EPA estimates that such increases are likely to be less than 1%, others in the industry have projected much higher increases.

Beneficial Use

Putting aside the significant discrepancy in projected costs of compliance and their impact on ratepayers, one of the many key issues likely to result from any final rule is whether CCR placed or otherwise managed on land constitutes a CCR management unit, or beneficial use. This distinction is critical because beneficial use is not regulated under the CCR rule, and thus would not be subject to the complex and costly compliance measures required under the rule.

Under the CCR rule, "beneficial use of CCR" means the CCR must provide a functional benefit; substitute for the use of a virgin material; and meet relevant product specifications, regulatory standards or design standards when available, and when such standards are not available, the CCR must not be used in excess quantities. In addition, for unencapsulated use of CCR involving land placement of 12,400 tons or more in non-roadway applications, the user must demonstrate 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 such environmental releases will be at or below relevant regulatory and health-based benchmarks for human and ecological receptors during use.

Although the EPA has provided some informal guidance on the meaning of beneficial use, how exactly the agency would distinguish between such use and a CCR management unit under its proposed regulations is not clear. Moreover, the EPA has said that beneficial use practices (such as using CCR as structural fill) before the 2015 rule are not required to meet the specific beneficial use criteria in the rule to be excluded from coverage. How the EPA's position could be impacted by its proposal is also not clear.

How these and many other CCR-related issues develop over the next few years could have significant implications for owners and operators of CCR facilities. The Resource Conservation and Recovery Act authorizes citizen suits for alleged non-compliance with solid waste rules, and the Water Infrastructure Improvements for the Nation (WIIN) Act authorizes federal enforcement of the 2015 CCR rule by the EPA. Such enforcement carries with it the potential for injunctive relief and significant civil penalties. Owners and operators should therefore keep a close eye on developments related to the EPA's proposed rule, including issues related to beneficial use of CCR. The EPA anticipates issuing a final rule in April 2024.

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