EPA Coal Ash Proposals Offer Flexibility, But Also Uncertainty

By **Jillian Kirn** (May 13, 2020)

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Despite the U.S. Environmental Protection Agency's current broad (but temporary) exercise of enforcement discretion, this has been a busy spring for the agency. On March 3, the EPA proposed revisions to the federal coal combustion residuals, or CCR, rule.

The proposal, which the EPA termed Part B of its "holistic approach to closure," follows the Part A proposal, published by the agency in November 2019. Part of a flurry of CCR-related activity, Part B came closely behind the EPA's proposed federal CCR permit program, published in the Federal Register on Feb. 20.

Meanwhile, on April 15, the U.S. District Court for the District of Columbia partially overturned the EPA's approval of Oklahoma's coal ash permit plan, holding that the program did not include cleanup provisions for certain unlined storage areas as required by the appeals court.[1]

Multiple utilities and trade organizations have noted that the electricity generation industry is one that relies heavily on long-term planning. These developments, along with other industry-impacting rule changes — such as the April 16 Mercury and Air Toxics Standards justification revision — expose the industry to increased uncertainty and, potentially, significant additional expenditures in order to deal with legacy liabilities.

CCR Rule Part A

On Nov. 4, 2019, the EPA proposed an amendment to the 2015 CCR rule. This Part A proposal is part of a multistep effort by the agency to address CCR, and was followed by another proposal announced the same day addressing effluent guidelines for coal-fired power plants.

As with the April 2020 MATS revision, the EPA has drawn sharp criticism from environmental advocates and nongovernmental organizations, who argue that the CCR rule proposal will permit more pollution and slow corrective action.

While the Part A proposal does permit utilities to apply for extensions for continued use of CCR impoundments, those who dismiss the rule as a rollback ignore some key facts:

- The majority of the CCR rule remains operational, including the ongoing requirement for groundwater monitoring and public disclosure of data.

- More impoundments will now fall within the scope of the obligation to stop use and either retrofit or close the impoundments.

- Although the EPA proposes to allow both short-term and longer extensions to compliance submission deadlines, the amendments include specific criteria for what utilities will need to submit to obtain the extensions, and measures for public transparency for both the basis for extensions and progress to reach closure.

On Aug. 21, 2018, in Utility Solid Waste Activities Group et al. v. EPA, the U.S. Court of Appeals for the D.C. Circuit vacated certain provisions of the 2015 CCR rule. The court also remanded some provisions to the EPA for further consideration.

In November 2019, the EPA's Part A proposal established a new deadline of Aug. 31 of this year for facilities to stop accepting CCR into surface impoundment units, and either retrofit them or initiate closure. The current deadline is Oct. 31.

Additionally, Part A proposes changing the classification for clay-lined or compacted soil-lined impoundments from lined to unlined, and specifies that all unlined units must be retrofitted or closed, not just those with groundwater contamination above regulatory levels.

These changes reflect the mandates from the D.C. Circuit. But critics of the EPA's proposal contend that the agency failed to address the exemption for legacy coal ash sites located at closed power plants, which the D.C. Circuit also found was unlawful.

To address circumstances that may preclude compliance with the Aug. 31 deadline — particularly for impoundments that would not have previously been included under the scope of the rule — the EPA proposes a series of amendments that create essentially two tracks for extension of the Aug. 31 deadline.

The first is a short-term alternative, designed to be self-implementing, which would grant facilities a three-month extension to the deadline to cease receipt of CCR waste. The second establishes a process and criteria to petition the EPA for site-specific approval for longer extensions, based on one of two demonstrations. To obtain more than the 30-day self-policing extension of the cease of receipt of waste deadline, the agency would require four lines of evidence from owner/operators:

- A demonstration of the lack of alternative capacity available onsite or offsite;

- A demonstration that CCR and non-CCR waste streams must continue to be managed in the CCR surface impoundment, due to the technical infeasibility of obtaining alternate capacity prior to Nov. 30 of this year — a demonstration that must include an analysis of the adverse impact to plant operations if the CCR surface impoundment in question were to no longer be available for use;

- A detailed workplan on obtaining alternate capacity for CCR and/or non-CCR waste streams, and a narrative discussion of the steps and process that remain necessary to complete development of alternate capacity for the waste stream(s); and

- A narrative on how the owner or operator will continue to maintain compliance with all other aspects of the CCR rule.

The proposed amendments include specific requirements for extension petitions; set out parameters for granting the extension; set deadlines to submit the applications; and require semiannual progress reports to be made publicly available. Increased cost or inconvenience will not be sufficient bases to extend the deadline. The EPA intends to publish decisions for public comment before issuing final orders to grant extensions.

The key deadlines in the proposal are summarized below:

Proposed Compliance Deadline for CCR Surface Impoundments	Deadline Date
New cease of waste deadline for unlined and formerly clay-lined surface impoundments	Aug. 31
New cease of waste deadline for surface impoundments that failed the minimum depth to aquifer location standard	Aug. 31
New short-term alternative to initiation of closure (up to a 3-month extension to cease of receipt of waste deadline)	No later than Nov. 30
New site-specific alternative to initiation of closure due to lack of capacity	No later than Oct. 15, 2023
New site-specific alternative to initiation of closure due to permanent cessation of coal-fired boiler(s) by a date certain for surface impoundments 40 acres or smaller	No later than Oct. 17, 2023
New site-specific alternative to initiation of closure due to permanent cessation of coal-fired boiler(s) by a date certain for surface impoundments larger than 40 acres	No later than Oct. 17, 2028

CCR Rule Part B

Part B of the CCR rule proposal builds upon the foundations of Part A. In Part B, the EPA proposes that owners and operators would be required to submit site-specific demonstrations within one year of submitting an initial application (13 months after the final rule's effective date).

If the EPA approves a demonstration, then such approval would be effective for the life of the unit. If the agency denies the demonstration, the unit would need to cease receipt of waste and initiate closure within six months.

This more recent proposal also addresses the use of CCR in units subject to closure for cause. Specifically, the EPA proposes two alternatives that would allow for the use of CCR during the closure process.

The first alternative would prohibit the addition of new CCR to a unit after the unit's closure

has begun, but would allow CCR to be used "for the purposes of supporting closure of the CCR unit." Practically speaking, this alternative would allow an owner or operator to consolidate CCR from multiple units into a single unit — even though the unit receiving the CCR was already required to cease receipt pursuant to the CCR rule's closure deadlines.

The EPA anticipates that such consolidation "would result in an overall smaller CCR unit footprint." In order to make use of this alternative, an owner or operator would need to conduct the work under an approved written closure plan, which would detail how the CCR would be used during the closure work.

The second proposed alternative allows for what it calls the "beneficial use" of CCR. The agency gives the example of CCR installed under a final cover system to ensure proper subgrade drainage. As with the first alternative, such beneficial use would also require a written closure plan for the affected unit(s).

One additional point of interest proposed in Part B is an additional closure by removal alternative for owners or operators who cannot meet the CCR rule's current closure by removal requirements and corrective action deadlines.

The EPA's Part B proposal would allow an owner or operator that cannot complete groundwater corrective action by the deadline for the other closure activities to finish groundwater corrective action during a post-closure care period. Groundwater remediation and monitoring is often a lengthy undertaking, and this approach would allow an owner/operator to certify that a CCR unit is closed, while continuing ongoing efforts to monitor groundwater.

Finally, in its Part B proposal, the EPA outlines additional reporting requirements geared toward increasing transparency surrounding the closure process. The proposal would require owners and operators to provide notice of intent to close a CCR unit, and would be required to provide certain annual updates regarding the status of the closure.

Those annual updates would include: (1) a summary of the unit's current stage of closure (e.g., dewatering, excavation, etc.); (2) an updated closure schedule that includes the dates of major closure milestones, and any changes to the closure schedule; and (3) information related to any issues experienced during closure which may impact the scheduled closure of the unit, and how those problems are being addressed. Under the EPA's proposal, these annual progress reports would be due by Jan. 31 of each year.

Next Steps for Owners and Operators of Impoundments

The comment period closed on Part B on April 17. Regardless of the outcome of the final revisions to the CCR rule, owners and operators of CCR impoundments have ongoing compliance obligations and potential for liability.

It is also important to remember that failure to comply with the CCR regulations is not the sole source of risk. Separate from the CCR rules, contamination from CCR disposal units can trigger federal or state cleanup requirements.

In addition, neighbors, public interest groups and other stakeholders may respond to alleged contamination from CCR units with litigation under citizen suit or other statutory provisions, or traditional common law claims such as nuisance or trespass. Further, the EPA's proposals, decisions and revisions on other rules that impact coal-fired plants foment

uncertainty and make a holistic CCR risk strategy (rather than one that focuses solely on regulatory compliance) even more prudent.

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[1] Waterkeeper Alliance Inc. et al. v. Andrew Wheeler et al., 1:18-cv-02230.