

# The State of Coal Ash Regulation and Implications for the Commonwealth



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**By Jillian C. Kirn | November 19, 2020 | The Legal Intelligencer**

Two recent developments, the finalization of Part B of the coal combustion residuals, or CCR, rule and the finalization of the 2020 Steam Electric Reconsideration Rule have triggered conversation about, and litigation over, the path forward for long-term management of CCR in the United States. The two federal rules raise questions about which coal-fired power plants and coal ash basins are required to close, the timeline for closure or compliance and, for operational plants, what sort of coal ash slurry treatment is required in order to effectuate compliance. In Pennsylvania, the Department of Environmental Protection (DEP) may face challenges from facilities requesting the relaxation of permit conditions to reflect the latest rules. Throughout the industry, pending litigation and tight deadlines may expose the electric generating industry to increased uncertainty and, potentially, expenditures in order to deal with CCR.

## **2020 Steam Electric Reconsideration Rule**

On Aug. 31, the U.S. Environmental Protection Agency (EPA) finalized a rule revising the regulations for the Steam Electric Power Generating category, previously regulated under the 2015 Effluent Limitations Guidelines (ELG rule), 40 CFR Part 423. The ELG rule revises requirements for two specific waste streams produced by steam electric power plants: flue gas desulfurization (FGD) wastewater and bottom ash (BA) transport water.

Published in the Federal Register on Oct. 13, the ELG rule exempts coal plants that run at lower capacity or are in their final years of service from having to comply with stricter standards adopted by EPA in 2015. In addition, it allows plants to use cheaper technology to clean wastewater from smokestack scrubbers that remove air pollutants and allows some treated coal ash slurry to be released into rivers and streams. For most facilities, it also extends the deadline for compliance to 2025.

## **CCR Rule Part B**

On Oct. 15, the EPA finalized its revisions to Part B of the CCR rule. The CCR rule was created under the Obama administration in response to major coal ash spills in multiple states. Under the Trump administration, the EPA has taken a number of steps to relax the 2015 CCR rule. In July, the Agency finalized Part A of the CCR rule, giving some facilities more time to close unlined coal ash ponds. Part B of the rule broadens the definition of which ponds are considered lined.

Under the 2015 rule, all new facilities that generated coal ash were required to build composite-lined ponds to store the CCR, but the rule allowed unlined or clay-lined facilities to continue operating. The 2015 CCR rule was challenged by environmental nongovernmental organizations as well as the Utility Solid Waste Activities Group. In 2018, the U.S. Court of Appeals for the D.C. Circuit handed down an opinion that noted that composite lining (a plastic geomembrane and several feet of compacted soil to act as a buffer) “effectively eliminates the risk of groundwater contamination.” In *Utility Solid Waste Activities Group v. Environmental Protection Agency*, the EPA identified 735 existing active surface impoundments through the country; of the 504 sites for which the EPA was able to collect liner data, only 17% had composite liners.

In *USWAG*, the D.C. Circuit vacated and remanded the provisions of the 2015 CCR rule that permitted unlined impoundments to continue receiving coal ash unless they leak, classified “clay-lined” impoundments as lined, and exempted inactive impoundments at inactive facilities from regulation. Part B of the CCR rule may attract litigation from environmental groups because of the EPA’s procedure that would allow facilities to demonstrate to the EPA or a participating state director that a clay-lined impoundment is, in fact, lined and therefore not subject to certain closure requirements. Operationally, Part B outlines a procedure by which facilities could use groundwater data and the design of a surface impoundment to show that a unit has and will continue to ensure there is no reasonable probability of adverse effects to human health and the environment and should be allowed to continue to operate. Though the deadline for an initial alternate liner application is Nov. 30, with the full alternate liner demonstration due Nov. 30, 2021, (two aggressive deadlines), the agency and industry maintain that the alternative liner demonstration provisions give industry more flexibility, while continuing to protect the environment.

### **What Does the ELG Rule Mean for Pennsylvania Facilities?**

On Nov. 2, nine conservation groups (including PennEnvironment, Inc.) filed a petition for review before the D.C. Circuit. The D.C. Circuit petition was filed on the heels of a similar complaint filed by a separate set of environmental organizations before the Fourth Circuit. The environmental organizations allege that the technology to treat FGD wastewater and BA transport water, though more expensive, is widely available and that the revised ELG rule endangers human health and the environment.

The DEP is currently reviewing the ELG rule. However, in 2018, the DEP entered into a settlement with environmental groups to require the tighter Obama-era waste controls at 10 coal-fired power plants around the commonwealth. Subsequently, water pollution permits for Pennsylvania’s coal-fired power plants have been updated with the provisions from the 2015 ELG rule. The existing permits and the pending litigation could put the DEP in a tricky position, as any plant that has not yet installed controls to comply with 2015 ELG rule could ask the DEP to revise its permits to reflect the more relaxed standards imposed by the 2020 ELG rule.

### **What Does Part B of the CCR Rule Mean for Pennsylvania Facilities?**

If it sticks, Part B of the CCR rule could be a boon for Pennsylvania brightfields and brownfields redevelopment projects. Pennsylvania already encourages beneficial use of coal ash, which is also included in Part B of the CCR rule, but in the past few years, there has been an uptick in the development of solar projects atop landfills, coal ash surface impoundments, and brownfields sites throughout the commonwealth. If an alternative liner determination is successful, then a decommissioned coal ash basin could be capped in place rather than excavated, creating a faster path to redevelopment.

### **What’s Next?**

The electricity generation industry is one that relies heavily on long-term planning. The pending litigation of the ELG rule and the quick deadlines and likely litigation over Part B of the CCR rule expose the industry to increased uncertainty and, potentially, significant additional expenditures in order to deal with legacy liabilities.

Even with some uncertainty surrounding the longevity of these two rules, owners and operators of CCR impoundments and coal-fired plants must contend with ongoing compliance obligations and potential for liability. It is also important to

remember that failure to comply with the CCR rule or the ELG rule is not the only source of risk. Separate from these two rules, contamination from CCR impoundments and coal-fired plants can trigger federal or state cleanup requirements and with litigation underway throughout the country, industry may face even greater scrutiny from neighbors, public interest groups, and other stakeholders, making a holistic CCR risk strategy (rather than one that focuses solely on regulatory compliance) especially prudent.

#### **About the Author:**

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