

# KIRKLAND ALERT

May 2010

## EPA's NPRM Concerning Coal Ash Regulation Under RCRA

On May 4, 2010, the United States Environmental Protection Agency ("EPA") announced a Notice of Proposed Rulemaking ("NPRM")<sup>1</sup> under the Resource Conservation and Recovery Act ("RCRA")<sup>2</sup> regarding the regulation of fly ash, bottom ash, boiler slag and flue gas desulfurization wastes *destined for disposal* (collectively, coal combustion residuals ("CCRs")<sup>3</sup>). Any CCRs which are not meant for disposal, but instead for beneficial uses, would be exempt from the rule (coal combustion products ("CCPs")).<sup>4</sup> Proposing two alternatives, EPA is currently soliciting comments on whether CCRs generated by electric utilities and independent power producers should be regulated under subtitle C of RCRA or subtitle D of RCRA. The two proposed alternatives vary greatly, but both could impose significant costs and burdens upon electric utilities and independent power producers.

Those wishing to comment on the NPRM are required to do so within ninety days of the publication of the NPRM in the Federal Register. We invite you to contact us with any questions about the matters addressed in this Alert, or for copies of any materials discussed in this Alert.

### 1. History of the Bevill Determinations

Under RCRA's Bevill exemption, certain large-volume wastes generated primarily from the combustion of coal or other fossil fuels were exempted from subtitle C of RCRA pending a determination by the EPA Administrator regarding whether such regulation was warranted.<sup>5</sup> In two separate determinations in 1993 and 2000, EPA ultimately found that the Bevill exemption should be retained and CCRs should not be regulated as hazardous wastes.<sup>6</sup> The 2000 finding, however, also stated that CCRs would be regulated as non-hazardous wastes under RCRA's subtitle D and that EPA would continue to evaluate whether the Bevill exemption should be repealed.<sup>7</sup> Presently, subtitle D regulations have yet to be issued, and a number of events have prompted EPA to revisit this subtitle C exemption. Chief among these was a failure of a containment wall at TVA's 1700 MW coal-fired Kingston Plant, located in Kingston, Tennessee, 35 miles west of Knoxville, at the junction of the Emory and Clinch Rivers in December 2008. This failure released approximately 5.4 million cubic yards of fly ash sludge into the Emory River, resulting in disruption to power and damage to gas lines and several homes, prompting EPA to once again evaluate the regulation of CCRs.<sup>8</sup>

### 2. Regulatory Alternatives under RCRA

In this NPRM, EPA has proposed two alternative schemes for RCRA regulation of CCRs. The costs and burdens vary greatly between these options, and this rulemaking will greatly impact electric utilities and independent power producers.

#### *(a) RCRA Subtitle C*

Subtitle C of RCRA regulates **hazardous** solid wastes. EPA has proposed to categorize CCRs as "special wastes," a category that would subject them to subtitle C regulation. Under this subtitle, CCRs would be heavily regulated from the "cradle to the grave." Such regulations would impose large burdens upon generators and transporters.<sup>9</sup> Additionally, permitting would be required of facilities which manage, dispose of, treat or store

CCRs.<sup>10</sup> Some uses of CCRs, however, would be exempted from this “special waste” distinction.

CCPs employed for “beneficial uses,” such as uses in wallboard and concrete materials, would not be considered “special waste,” and would, therefore, be exempt from all such requirements.<sup>11</sup> While this would appear to maintain the status quo for beneficial reuse of CCPs, the NPRM also states that EPA is studying how these materials are actually used to determine whether future regulatory guidance is necessary.<sup>12</sup>

Additionally, under this regulatory approach, EPA intends to establish new land disposal prohibitions and treatment standards for both wastewater and non-wastewater CCRs. In order to prevent events such as the Kingston release, EPA also seeks to address dam safety and stability issues, including proposing design and inspection requirements for surface impoundments.<sup>13</sup>

Unlike subtitle D, subtitle C allows EPA to enforce directly any requirements it imposes. Thus, EPA would be able to sue an alleged violator of subtitle C instead of relying upon states and citizens to bring suits.<sup>14</sup>

By regulating CCRs under subtitle C, EPA will also bring CCRs within the statutory framework of the Comprehensive Environmental Response, Compensation and Liability Act (“*CERCLA*”). Currently, hazardous wastes (and, potentially, “special wastes”) listed under RCRA exhibiting one or more of the characteristics of hazardous wastes are considered “hazardous substances” under *CERCLA*. Consequently, if CCRs were released in amounts equal or exceeding reportable quantities, the release would fall under *CERCLA* reporting requirements.<sup>15</sup>

Thus, should EPA adopt regulations specifying CCRs as “special wastes” subject to subtitle C of RCRA, electric utilities and independent power producers that generate CCRs will be subject to significantly higher costs associated with the management of CCRs. Not only will utilities and power producers see higher costs because of their own generating activities, but they will also encounter increased costs in transporting and disposing of CCRs. Further, by listing CCRs as “special wastes,” any release of CCRs above reportable quantities will trigger *CERCLA* reporting requirements.

### (b) RCRA Subtitle D

Regulation under subtitle C appears to be EPA’s preferred approach. Before meeting with the White House to discuss the NPRM, EPA had submitted a draft of the NPRM to the Office of Management and Budget proposing subtitle C regulation exclusively. However, after extensive meetings with the industry as well as the White House, the final NPRM also suggested subtitle D regulation.<sup>16</sup>

Unlike subtitle C, regulation of CCRs under subtitle D would only impose duties upon electric utilities and independent power producers when CCRs are disposed. Subtitle D regulates specific solid wastes by establishing national criteria to ensure the safe disposal of these wastes and prevent disposal of these solid wastes in an “open dump.”<sup>17</sup> No corresponding burdens are required of generators and transporters and no permits are required. The requirements of subtitle D typically take the form of a technical design standard or performance criteria.<sup>18</sup> Additionally, EPA has no authority to enforce these standards or criteria, but must instead rely upon the states’ enforcement and citizens’ suits.<sup>19</sup>

### 3. Bevill Determinations Revisited

It is clear that, whether under subtitle C or subtitle D, EPA intends to regulate CCRs. Under either of the alternatives, higher costs will result for electric utilities and independent power producers. Should the subtitle C approach be implemented, electric utilities and independent power producers will face stringent requirements usually reserved for hazardous wastes, requirement that would be enforceable by EPA. If EPA takes the less stringent route under subtitle D, costs will still be higher if and when utilities and power producers wish to dispose of CCRs.

<sup>1</sup> Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals for Electric Utilities, *available at*: <http://www.epa.gov/epawaste/nonhaz/industrial/special/fossil/ccr-rule/index.htm> (last visited May, 19, 2010) (*hereinafter* NPRM).

<sup>2</sup> 42 U.S.C. §§ 6901–6992k (*hereinafter* RCRA).

- 3 NPRM at 10.
- 4 *Id.* at 5-6.
- 5 RCRA § 3001(b)(3)(A)(i).
- 6 Final Regulatory Determination on Four Large-Volume Wastes From the Combustion of Coal by Electric Utility Power Plants, 58 Fed Reg. 42466 (Aug. 9, 1993) *available at*, <http://www.epa.gov/epawaste/nonhaz/industrial/special/mineral/080993.pdf>; Regulatory Determination on Wastes from the Combustion of Fossil Fuels; Final Rule, 65 Fed Reg. 32214 (May 22, 2000), *available at* <http://www.epa.gov/fe-drgstr/EPA-WASTE/2000/May/Day-22/f11138.htm>.
- 7 NPRM at 42-43.
- 8 Region 4, TVA Kingston Fossil Plant Fly Ash, [www.epa.gov/region4/kingston/index.html](http://www.epa.gov/region4/kingston/index.html) (last visited May 13, 2010).
- 9 NPRM at 187.
- 10 Note that this burden would be so great to surface impoundments that the EPA has conceded that “for all practical purposes, [regulation under subtitle C] would have the effect of requiring the closure of existing surface impoundments receiving CCRs within four years of the effect date of [the] proposed rule.” (*Id.* at 204).
- 11 *Id.* at 187.
- 12 *Id.* at 134.
- 13 *Id.* at 188.
- 14 *Id.* at 29.
- 15 The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 42 U.S.C. § 9601(14)(C). Note that some of these releases may already be subject to CERCLA reporting requirements because CCRs may contain listed hazardous substances in amounts great enough to trigger reportable quantity obligations. (NPRM, pg. 228).
- 16 Comparison of October 16, 2009 OMB Review Draft and Final CCR Proposed Rule, <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480ae7513> (last visited May 18, 2010).
- 17 RCRA § 4005(a). The EPA has also proposed a subtitle “D prime” scheme under which subtitle D would be relaxed for CCRs so that surface impoundments could remain open for their useful lives. (NPRM at 338).
- 18 NPRM at 271.
- 19 *Id.* at 272.

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If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Granta Y. Nakayama  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005-5793  
[www.kirkland.com/gnakayama](http://www.kirkland.com/gnakayama)  
+1 (312) 862-5074

Elaine M. Walsh  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005-5793  
[www.kirkland.com/ewalsh](http://www.kirkland.com/ewalsh)  
+1 (202) 879-5044

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