

Strafford

Presenting a live 90-minute webinar with interactive Q&A

Coal Ash Storage and Disposal: Liability Issues for Utilities, Recent State Legislation

Coal Combustion Residuals Challenges for Utilities Under Federal and State Law

TUESDAY, AUGUST 20, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Andrew C. Hanson, Senior Counsel, **Perkins Coie**, Madison, Wis.

Michael J. Nasi, Partner, **Jackson Walker**, Austin, Texas

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-755-4350** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.



COUNSEL TO GREAT COMPANIES

The State of Play in Coal Ash Regulation

Presented by:

Andrew Hanson

Perkins Coie LLP

CCR Storage: Landfills and Impoundments

- ❑ Landfills: on average, 120 acres and more than 40 feet deep
- ❑ Surface impoundments: on average, more than 50 acres with an average depth of 20 feet
- ❑ As of 2012:
 - ❑ There were at least 310 active landfills and 735 active surface impoundments (more than 500 are unlined) in the U.S., and
 - ❑ At least 111 inactive surface impoundments that were not fully closed





A: The Kingston Fossil Plant in September of 2008 before the coal ash pond collapsed.
B: The Kingston Fossil Plant taken on December 22, 2008 after the spill.

Clean Water Act

- ❑ Purpose is to “restore and maintain ...the Nation’s waters” by requiring a permit from EPA or a state to “discharge... any pollutant” to waters covered by the CWA.
- ❑ Definitions key to jurisdictional reach
 - ❖ “Discharge of a pollutant” means the “addition of any pollutant to navigable waters from any point source.” 33 U.S.C. 1362(12).
 - ❖ Navigable waters are defined broadly as “the waters of the United States”
 - ❖ “Point source” includes “any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure.

RCRA

- ❑ Regulates solid and hazardous waste storage and disposal, including storage of coal ash solid waste in landfills and settling ponds through EPA’s CCR rule.
- ❑ The CWA and RCRA do not overlap. In simplest terms, RCRA regulates the waste while it is stored in a pond or landfill, and the CWA regulates the discharge from the pond to navigable waters.

Courts Divided on CWA and Groundwater

- ❖ *Hawai'i Wildlife Federation v. Co. of Maui*, Feb. 2018: 9th Cir. held County's discharge of sewage effluent into 4 groundwater injection wells that indirectly discharged into ocean via groundwater required the County to obtain an NPDES permit
- ❖ *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, Apr. 2018: 4th Cir. held a pipeline need not directly deliver pollutants to surface waters for CWA liability to arise
- ❖ *Sierra Club v. Virginia Electric & Power Co.*, Sept. 2018: 4th Cir. held on-site landfill and settling ponds used by an electric utility to store coal ash do not constitute "point sources" under the CWA
- ❖ *Ky. Waterways All. v. Ky. Utilities Comm.*; *Tenn. Clean Water Network v. Tenn. Valley Auth.*, Sept. 2018: 6th Cir. held that pollutant discharges were not "into" nearby navigable waters. Instead, the discharges were first to groundwater, which the CWA does not regulate, and then to surface water

Supreme Court Set to Resolve the Circuit Split

- ❑ On February 19, 2019, the United States Supreme Court granted certiorari in *Hawaii Wildlife Fund et al. v. County of Maui*
- ❑ Issue: whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater



History of the CCR rule

- ❑ **April 17, 2015** - EPA issued its final rule regulating the disposal of CCRs from electric utilities
 - Established technical requirements for CCR landfills and surface impoundments under RCRA subtitle D, which prohibits “open dumps”
- ❑ **June 14, 2016** - D.C. Circuit partially vacated the rule and remanded four settled claims back to the EPA
- ❑ **August 5, 2016** - EPA published a direct final rule and companion proposal extending applicability of rule to certain inactive CCR surface impoundments
- ❑ **September 13, 2017** - EPA granted request that it reconsider certain provisions of the 2015 final rule

Water Infrastructure Improvements for the Nation (WIIN) Act

❑ The major provisions of the WIIN Act include:

- ❖ States may develop and submit a CCR permit program to EPA for approval.
- ❖ The program does not have to be identical to the current CCR rule but must be at least “as protective as” the CCR rule.
- ❖ EPA has 180 days to act on a complete State submission and may approve a program “in whole or in part.”
- ❖ Once approved, the State permit program operates “in lieu of” the federal CCR rule.
- ❖ In States that do not have an approved permit program, EPA must implement a permit program, “subject to the availability of appropriations specifically provided to carry out a program....”

❑ EPA has approved one state program (Oklahoma)

❑ EPA has proposed approval of an additional state program application (Georgia)

- ❖ Public comment period ends on August 23

Amendments to Coal Combustion Residual Rule

- ❑ July 30, 2018 (Phase One): EPA finalized certain changes to the 2015 CCR rule
 - ❖ Provided EPA and states (with approved CCR permit programs) the ability to use alternate performance standards
 - ❖ Revised the groundwater protection standards for constituents that do not have an established drinking water standard
 - ❖ Provided facilities that are triggered into closure by the regulations additional time to cease receiving waste and initiate closure

USWAG v. EPA

901 F.3d 414 (D.C. Cir. 2018)

- ❑ Environmental petitioners successfully challenged the CCR rule's requirements for the following as insufficient to meet RCRA's "no reasonable probability of adverse effects on health or the environment" standard:
 - ❖ Existing unlined impoundments - Rule only required semi-annual groundwater monitoring and then closure when leaks are discovered.
 - ❖ Existing clay lined impoundments - Owners got up to five months just to evaluate the remedy, and then an "additional, indefinite amount of time" to select the remedy. And if the remedy fails or is ineffective, closure could take years.
 - ❖ Legacy ponds - CCR rule required remediation only after leakage was discovered.

USWAG v. EPA

901 F.3d 414 (D.C. Cir. 2018)

❑ Industrial petitioners challenged EPA's authority to set standards for inactive impoundments:

- ❖ Industry relied on the definition of “open dump” as “any facility or site where solid waste is disposed of... .”
- ❖ According to industry, the phrase “is disposed of” requires active disposal, which would exclude inactive impoundments. But the court disagreed, using a less than flattering analogy:
 - *“Think of it this way: If a kindergarten teacher tells her students that they must clean up any drink that ‘is spilled’ in the room, that would most logically be understood to mean that a student must clean up her spilled drink even if the spill is already completed and nothing more is leaking out of the carton. A student who refused to clean up that completed spill (as Industry Petitioners would have it) might well find himself in timeout.”*

USWAG v. EPA

901 F.3d 414 (D.C. Cir. 2018)

- ❑ Industry petitioners challenged the alternative closure exemption for failing to consider costs:
 - ❖ Rule allows a noncompliant CCR site to continue operating for another five years before it ceases operations.
 - ❖ To qualify, the owner had to certify that there is no alternative disposal capacity available on or off-site; increased costs or inconvenience don't qualify.
 - ❖ Court found no mention of cost considerations in the relevant RCRA provision, and thus EPA was justified in not considering them.

July 2019 Proposed Rule

- ❑ **Makes targeted changes to the 2015 CCR rule**
 - ❖ Revises the annual groundwater monitoring and corrective action report requirements
 - ❖ Establishes an alternate risk-based groundwater protection standard for boron
 - ❖ Revises the publicly accessible CCR website requirements

- ❑ **Addresses provisions that were remanded back to EPA on August 21, 2018 by the D.C. Circuit:**
 - ❖ Revises the CCR beneficial use definition regarding the environmental demonstration requirements for unencapsulated uses
 - ❖ Revises the requirements applicable to piles of CCR

Recall EPA's 2015 Final Beneficial Use Criteria...

1. The CCR must provide a functional benefit;
2. The CCR must substitute for the use of a virgin material, conserving natural resources that would otherwise need to be obtained through practices such as extraction;
3. The use of CCRs must meet relevant product specifications, regulatory standards, or design standards when available; and
4. When unencapsulated use of CCRs involves placement on the land of 12,400 tons or more in non-roadway applications, the user must demonstrate that environmental releases to ground water, surface water, soil and air are comparable to or lower than those from analogous products made without CCRs, or that environmental releases to ground water, surface water, soil and air will be at or below relevant regulatory and health-based benchmarks for human and ecological receptors during use.

July 2019 Proposed Rule

❑ Beneficial reuse definition

- ❖ Proposing to eliminate the mass-based numerical threshold for unencapsulated use that is used to trigger an environmental demonstration and instead replace it with specific location-based criteria

❑ Requirements applicable to piles of CCR

- ❖ Proposing to create a single standard to consistently address the potential environmental and human health issues associated with piles, regardless of the location of the pile and anticipated end use of the pile

EPA Seeking Comment On:

- ❑ Proposed elimination of the mass-based numerical threshold, to be replaced with specific location-based criteria derived from existing location criteria for CCR disposal units;
- ❑ Specific criteria that would represent an appropriate trigger for an environmental demonstration, such as setbacks, proximity to water, specific criteria for CCR use, and any other requirements that state beneficial use programs have in place;
 - ❖ EPA's proposal to adopt location criterion based on distance to the uppermost aquifer, wetlands, a waterway, or a water supply well; placement in an unstable area; a distance of within 200 feet from a fault area; and/or in a seismic zone to trigger an environmental demonstration.
 - ❖ Whether prohibiting the placement of CCR for beneficial use within the above-mentioned areas is more consistent with the CCR disposal regulations.

The CCR Rule Matters...



COUNSEL TO GREAT COMPANIES

Recent Enforcement Actions

Duke Energy – Feb. 2, 2014



<https://www.nytimes.com/2014/03/01/us/coal-ash-spill-reveals-transformation-of-north-carolina-agency.html>

Duke Energy – Subsequent Enforcement

□ EPA settlement

- ❖ In 2014, the EPA entered into a \$3 million administrative settlement agreement with Duke Energy

□ Federal Investigation

- ❖ Plea agreement in 2015, \$68 million fine and \$34 million in environmental projects

Duke Energy – NRD Settlement

□ July 18, 2019

- ❖ EPA, North Carolina and Virginia filed and proposed consent decree alleging CERCLA NRD claims related to the 2014 coal ash spill.
- ❖ Proposed decree requires reimbursement of costs and various restoration projects.

Duke Energy – NCDEQ-imposed Closure Plan

□ April 1, 2019

- ❖ N.C. DEQ ordered Duke Energy to excavate certain remaining coal ash impoundments in North Carolina.
- ❖ After review of Duke Energy's proposals for its N.C. facilities, DEQ required excavation as the method of closure at nine sites, with disposal required in a line landfill.
- ❖ Duke filed an administrative an appeal.

Duke Energy Appeals NCDEQ Closure Plan

- ❑ On August 2, 2019, ALJ granted NCDEQ's partial motion to dismiss Duke Energy's appeal, finding that Duke failed to state a claim for relief that NCDEQ, among other things:
 - ❖ Erred in ordering excavation as a remedy for each of the nine coal ash impoundments; and
 - ❖ Erred in determining that closure must be fully implemented by December 31, 2029.

Other Recent Enforcement Actions

The Gadsden Times

ADEM fines Alabama Power over ash pond pollutants

By Donna Thornton / Times Staff Writer

Posted May 17, 2019 at 5:00 PM

Updated May 17, 2019 at 6:34 PM

Alabama Power will pay a \$250,000 fine to the Alabama Department of Environmental Management after groundwater monitoring detected higher than allowed levels of pollutants from the now-closed Gadsden Ash Pond.

The company says there's no indication the pollutants have affected local drinking water sources.

 **UTILITY DIVE**

BRIEF

TVA agrees to excavate 12M tons of coal ash after 5-year battle

Catherine Morehouse

By

Published June 14, 2019

Questions?

Andrew Hanson

(608) 663-7498

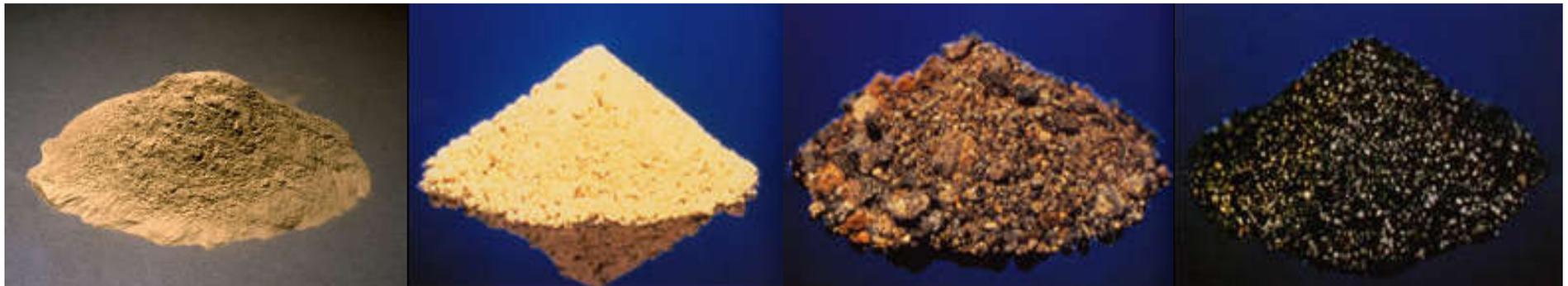
AHanson@perkinscoie.com



Mike Nasi
Jackson Walker L.L.P.
mnasi@jw.com
512-236-2000

State Implementation of Federal Coal Combustion Residuals Rule

*Strafford Webinar
August 20, 2019*



Watershed Momentum for State Implementation of CCR Regulation



- **December 2016-** the Water Infrastructure Improvements for the Nation (WIIN) Act was enacted, establishing new statutory provisions applicable to CCR units.
 - Amended RCRA to establish EPA to implement or authorize permitting/"other system of prior authorization"
 - States empowered to apply to EPA for approval to operate a state CCR Program "in lieu of" the Federal CCR Rule.
 - EPA has 180 days to act on a complete State submission and may approve a program "in whole or in part."
 - State program may include alternative standards, provided they are "at least as protective" as CCR Rule



Post-WIIN Act CCR Playing Field (cont.)



- Upon appropriation of funds (which has occurred) Federal program implemented in states that do not seek a state program or in states where application has been denied or withdrawn (Act refers to these as “Nonparticipating States”)
- CCR Rule remains self-implementing until program approval
- WIIN Act Expands EPA Enforcement Authority
 - Enforcement of State Program
 - Enforcement of Federal Program
 - Enforcement in states where CCR Rule remains self-implementing



Wish List of Post-WIIN Act CCR Rule Fixes



REQUIREMENT	EXISTING RULE	POTENTIAL PROGRAM IMPROVEMENTS
MONITORING	Extensive groundwater monitoring to detect increases over background levels, regardless of risk.	<p>Risk-based groundwater protection standards (inc. GW classification).</p> <p>Clarify (per remand) that boron does not need to be in Appendix IV; ensure proper constituents are included in GW monitoring.</p> <p>Provide additional flexibility, like MSWLF regs. (e.g. allow GW monitoring to be suspended if demonstration of no potential for migration of haz. constituents from unit to uppermost aquifer.)</p> <p>Allow for other alternative monitoring.</p>
LINER	Synthetic liner requirements for new landfills/impoundments.	Alternative liner design; account for hydrogeological characteristics, climate, volume/physical characteristics of ash.
CLOSURE REQUIREMENTS	Uniform requirements for closure and post-closure; specific deadlines to close certain units.	Site-specific closure requirements; provide additional time and flexibility for closure (e.g. extend time for surface impoundment closure; differentiate between GW classes).
BENEFICIAL USE	Narrow definition of beneficial use; potential exposure to liability.	Broaden definition to allow other types of beneficial uses, including land application.

Key Recognition by DC Circuit Regarding Post-WIIN Act State Implementation of CCR Rule

- Despite DC Circuit's refusal to rule on EPA's exclusion of risk-based compliance measures in the 2015 CCR Rule (*because the court noted EPA's Phase 1 Rule rendered such challenges moot*), it acknowledge some things about the WIIN Act that are favorable:

Although the WIIN Act does not affect the validity of the [2015] Rule itself, it does provide the EPA with new tools to pursue its regulatory goals. . . . Although a one-size-fits-all national standard might have been necessary for the self-implementing Final [2015] Rule, more precise risk-based standards are both feasible and enforceable under the individualized permitting programs and direct monitoring provisions authorized by the WIIN Act. . . . Thus, the regulatory tools authorized by the WIIN Act support EPA's request to reconsider certain provisions of the [2015] Rule.

IDEAL CCR Rule Refinement & Implementation

STATES

STEP 1: GET READY

Assess state programs for approvability, legality, and resource adequacy:

- State legislation needed?
- State appropriation needed?

STEP 2: GET GOING

Develop a simple, incorporation-by-reference state rule that cross references existing federal criteria.

STEP 3: GET FIXED

Once EPA has finalized federal rule refinements, develop and promulgate more site-specific, risk-based state program and submit for EPA approval

FEDERAL

STEP 1: GIVE RELIEF & GUIDANCE

- Announce relief from initial hammers in rule (e.g., July 2019).
- Develop process for state program review, funding for state programs, & guidance on interpretive issues.

STEP 2: REVIEW & APPROVE

Review, approve, and fund initial state program submittals.

STEP 3: REFINE & RE-APPROVE

Rulemaking to refine rule to allow for more site-specific and risk-based corrective action options.



Key State Implementation CCR Rule Changes Since WIIN Act

July 17, 2018 “Phase 1” Rule – EPA signed final rule to:

- Extend “cease receiving waste” deadline for “unlined” units with SSI above a GWPS and units is unable to comply with the aquifer location restriction. (Extended 18 months - October 31, 2020)
- Adopted two alternative performance standards for approved states:
 - suspend groundwater monitoring requirements if there is evidence that there is no potential for migration of hazardous constituents to the uppermost aquifer; and
 - issue technical certification in lieu of the current requirement to have professional engineers issue certifications.
- Revised GWPS for the four constituents listed in Appendix IV that do not have an established Maximum Contaminant Level (MCL)
- Noticeably absent (compared to proposed rule): Boron not added to App. IV & further risk-based refinements deferred to a future rulemaking.



Key State Implementation CCR Rule Changes Since WIIN Act

August 14, 2019 “Phase 2” Rule – EPA released proposal to address:

- Beneficial Use Definition: replace the 12,400-ton threshold that triggering an environmental demonstration with location-based criteria derived from the 2015 rule’s location standards;
- CCR Piles: defined as “storage” regardless of location and regardless of whether CCR is destined for disposal or beneficial use;
- GW Monitoring/Corrective Action Report: New requirement to provide a summary of groundwater monitoring and corrective action status for each unit;
- GW monitoring limit for Boron: *proposed* limit of 4,000 micrograms/liter (this is not a decision to add Boron to Appendix IV, but a proposal for what the limit would be *if* Boron is added); and
- Public-facing websites: all information required to be on each facility’s website be available to any member of the public, including through printing and downloading, without any requirement that the public wait to be “approved,” or provide personal information to access the website

Recent/Upcoming Key Dates

7/15/19-Corrective Measure Study (CMS) Due (*ASD unsuccessful*)

9-15-19- Complete CMS (if 60 day extension justified)

10/31/19 - **Cease receipt of CCR/WW in “unlined” Impoundments**

- Unless EPA adjusts timelines again by rule
- Includes clay-lined units until EPA addresses by rule
- Can be extended if alternative closure option justified (which could extend as much as 5 years).

10/19-6/20 - Public Meetings & Remedy Selection

2020-2021 – Key state plan submittal/approval period



Mike Nasi
Jackson Walker L.L.P.
mnasi@jw.com
512-236-2000

Questions?