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EPA's New RCRA Subtitle D Coal Combustion Rules

are Published in the Federal Register

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EPA's new rules regulating the disposal of coal combustion residuals as non-hazardous solid waste under the Resource Conservation and Recovery Act (RCRA) Subtitle D have been published in the Federal Register. The rules are effective on October 14, 2015, and they are being challenged in court.

While the rules are limited to the regulation under RCRA of Coal Combustion Residuals (CCR) generated by electric utilities that burn coal to produce energy—one of the largest industrial waste streams generated in the United States—this rulemaking proceeding is also significant in that it illuminates the statutory constraints EPA faced while it developed these rules under the authority of RCRA Subtitle D. The agency considered the option of regulating these wastes, which are generated and managed in massive amounts, under its broad and comprehensive RCRA Subtitle C hazardous waste regulatory authority, but it decided that it was inappropriate to do so at this time. Years ago, EPA determined that these wastes were more properly regulated as a non-hazardous “Bevill Waste,” and it has not revisited this decision. The facilities that handle these wastes are surface impoundments and landfills, and EPA has developed new federal standards for the disposal and management of CCR waste in these facilities. These rules will be located at Part 57 of the EPA Rules, which sets forth the agency's criteria for the classification of solid waste disposal facilities and practices.



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The new CCR rules establish location restrictions, design criteria, operating criteria (including surface water run-off and run-on controls for CCR landfills and surface impoundments), groundwater monitoring and corrective action, closure and post-closure care, and most significantly, recordkeeping and notification requirements and the duty to post publicly accessible internet site information. If CCR facilities satisfy these criteria, they will be considered to be non-hazardous solid waste disposal facilities and solid waste management practices that “do not pose a reasonable probability of adverse effects on health or the environment”, a standard that is embedded in RCRA at 42 USC § 6944(a). If a facility does not satisfy these criteria, it could be considered an “open dump”, whose continued operation is illegal under RCRA and therefore subject to the enforcement and compliance tools available to enforcement authorities under RCRA Subtitle D.

EPA took pains to state that the rules do not require federal permits, do not require states to adopt

or implement these requirements, and indeed, EPA cannot enforce these requirements. In the absence of direct statutory enforcement authority, EPA issues solid waste management guidelines and criteria, which are often incorporated by states into their existing state solid waste management plans. If the states submit a plan for EPA’s approval, then it is possible that EPA will provide financial assistance to the state. EPA also stresses that the new rules can primarily be enforced through the Citizen Suit provisions of RCRA Section 7002; the agency advises that both states and citizens can take advantage of the Citizen Suit provisions of the law to force the closure and/or cleanup of “open dumps”, and it is certainly conceivable that the practice of using large-scale landfills and surface impoundments could be in jeopardy in some areas when the requirements of the new rules are finally effective. The utility of this enforcement tool will be enhanced by the ready availability of operating information that the rules also require to be maintained and posted on the internet. **em**

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