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## Coal Ash Backfill: Congress Authorizes EPA to Approve State Coal Combustion Residue Programs

*By David L. Rieser*

As mentioned in our Alert of [“A WIIN for Water Infrastructure”](#) on the recently signed Water Infrastructure Improvements for the Nation (“WIIN”) Act, Congress included provisions intended to provide national consistency and certainty in the implementation and enforcement of Environmental Protection Agency’s (“EPA”) 2015 regulations on the Disposal of Coal Combustion Residue (“CCR”).<sup>1</sup>

In the CCR Rules, EPA established specific requirements for the siting, operation and closure of CCR impoundments operated by electric utilities. Because of the statute under which it adopted the rules, however, EPA lacked the ability to issue permits to such facilities to ensure compliance, to approve state permit programs adopting the federal rules, or to otherwise directly enforce the requirements. While regulated industries would generally find those conditions positive, the absence of federal authority caused significant conflicts and uncertainty. The lack of a permit program and process make it difficult for electricity generators to demonstrate compliance and the lack of federal approval of state programs could leave generators open to enforcement actions by citizen suits for noncompliance with the federal rules, even if they were in compliance with the state programs. In a broad compromise, the WIIN Act authorized EPA to review and approve state permit programs and to bring its own enforcement actions. These changes are intended to nationalize the effectiveness of the CCR Rules and provide greater certainty in implementation.

### Background

EPA proposed the CCR Rules in response to the outcry over the release of millions of pounds of CCR from a Tennessee Valley Authority impoundment in Kingston, Tennessee but delayed its adoption due to a debate as to how intensely it should regulate CCR. EPA eventually issued the CCR Rule pursuant to its authority under the solid waste provisions of Subtitle D of the Resource Conservation and Recovery Act (42 U.S.C 6901 et seq.; “RCRA”) rather than under its much broader authority under the hazardous waste provisions of RCRA’s Subtitle C.

Subtitles D and C authorize very different regulatory schemes reflecting the differences in risk between hazardous and solid wastes and the tradition of local control over solid waste issues. Subtitle C authorizes EPA to use broad regulating powers including federally enforceable requirements, a federal permit program, minimum standards for state programs, and authority to delegate permitting authority to the states. In contrast, Subtitle D allows EPA to set minimum standards, but not much else. It cannot issue permits, bring enforcement actions to enforce the standards, or authorize and approve state permit programs. After much discussion, EPA chose to act under Subtitle D—despite its diminished authority—to

<sup>1</sup> 80 Fed. Reg. 21,302, April 17, 2015; 40 C.F.R. § 257.

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avoid the devastating impact regulating CCR as a hazardous waste would have on CCR generators and on CCR's substantial beneficial reuse markets.

In fact, EPA's adoption of the CCR Rules under Subtitle D created numerous issues for electricity generators and environmental organizations. Both industry and environmental organizations challenged the rules, with industry claiming that they were not statutorily authorized and the environmental community arguing that they were not sufficiently stringent. EPA encouraged the states to adopt their own CCR regulations and permit programs, but because there was no mechanism for EPA to approve state regulations, generators could not be sure that compliance with state permits and regulations would be sufficient to document compliance with federal regulations. While not enforceable by EPA, the CCR rules could be enforced by environmental organizations using RCRA's citizen suit provision, creating the very real issue of uneven and inconsistent regulation as a result of individual decisions by courts and plaintiffs.

### The WIIN Act

The WIIN Act seeks to address these issues by giving EPA more typical regulatory powers with respect to the CCR Rules and specifically authorizing EPA to establish a process to approve state permit programs. The statute authorizes EPA to adopt minimum standards for state permit programs, to approve state programs as being consistent with federal standards and to withdraw approval should the state not comply with the federal approach. It allows EPA to bring enforcement actions against facilities that do not comply with the CCR rules by characterizing such facilities as "open dumps," the only type of facility against which Subtitle D allows EPA to take action. Finally, it allows EPA to adopt a permit program for states that fail to adopt their own. While the WIIN Act will generally limit state ability to adopt regulations intended to reflect local conditions but are deemed less stringent than the federal rules, it also allows EPA to approve such programs based on specific and different circumstances.

If nothing else, the WIIN Act will provide a clear path for those states interested in adopting the CCR rules and implementing an additional permit program consistent with a federal program. Electric generators responsible for CCR impoundments will now need to work with their state level regulators to develop CCR programs that meet the federal standards but are still sufficiently flexible to meet local needs and fit within local programs.

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