



Federal CCR Regulatory Update: EPA Adds CCR To National Enforcement and Compliance Initiatives and Proposes to Deny Alabama's CCR Permit Program

In the past week, the U.S. Environmental Protection Agency (EPA) has made two major announcements related to the regulation of Coal Combustion Residuals (CCR). On August 17, 2023, EPA announced its National Enforcement and Compliance Initiatives for fiscal years 2024 through 2027, adding “protecting communities from coal ash contamination” to a list of six priority areas for enforcement. Three days earlier, EPA published notice in the *Federal Register* of its proposal to deny Alabama’s application to administer its own CCR permitting program in lieu of EPA’s federal CCR program. These developments are among other CCR-related regulatory proposals from EPA earlier this year and a sign that EPA’s focus on CCR regulatory and enforcement will continue.

EPA Adds Coal Ash Contamination as an Enforcement Initiative

Every four years, EPA publishes a list of national initiatives to focus its enforcement efforts. On January 12, 2023, EPA published notice in the *Federal Register*, seeking comment on the NECIs for fiscal years 2023 to 2027. [88 Fed. Reg. 2093](#). In this notice, EPA listed “Addressing CCR” as one area “for further consideration of possible development” as an NECI. EPA has now [formally adopted](#) CCR issues as an enforcement priority for the next four years, all but guaranteeing that EPA will prioritize CCR enforcement and compliance over the next several years.

EPA Proposes to Deny Alabama's CCR Permit Program

On August 14, 2023, the U.S. Environmental Protection Agency (EPA) published notice of its [proposed denial](#) of Alabama’s application to operate its own Coal Combustion Residuals (CCR) permit program in the *Federal Register*. *Alabama; Denial of State Coal Combustion Residuals Permit Program*, [88 Fed. Reg. 55,220](#).

Section 4005(d) of the Resource Conservation and Recovery Act (RCRA) allows states to seek approval from EPA to administer a state CCR permit program in lieu of the federal CCR Rule. EPA will approve a state’s CCR permit program if the state program requires each CCR unit in the state to achieve compliance with either the federal requirements or state requirements that are as protective of the federal requirements. EPA has already approved CCR permit programs in Oklahoma, Georgia, and Texas, and did so without imposing conditions. EPA’s proposed denial of Alabama’s program is the first time EPA is proposing to deny an application.

The Alabama Department of Environmental Management (ADEM) submitted permit program applications to EPA Region 4 on July 12, 2018, February 26, 2021, and December 29, 2021. While its application before EPA was pending, ADEM began issuing CCR permits and has been doing so since it promulgated its first set of CCR regulations in 2018. ADEM has identified 16 CCR units (three landfills and 13 surface impoundments) that currently, or have been, used for CCR disposal

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in Alabama. Since 2018, ADEM had issued permits to eight CCR facilities. Thus, EPA's proposed denial comes after ADEM has issued permits for half of the CCR-regulated units in the state.

In its proposal, EPA stated that although Alabama's regulations "largely mirror" the federal CCR regulations, it believes ADEM has been issuing permits for CCR units containing permit terms that are neither the same nor as protective as the federal CCR regulations. EPA's proposal states that it is particularly concerned with deficiencies in ADEM's permits related to closure requirements for unlined surface impoundments, associated groundwater monitoring networks, and corrective action requirements. According to EPA, ADEM's permits allow CCR in closed units to remain saturated by groundwater, without requiring any engineering measures to control groundwater flowing into and out of the closed unit. Additionally, ADEM has approved groundwater monitoring systems with an inadequate number of wells in incorrect locations and ADEM's permits effectively allow the permittee to delay implementation of effective measures to remediate groundwater contamination. For these reasons, EPA proposed to deny Alabama's CCR permit program.

EPA compared Alabama's permit conditions with EPA's CCR Rule and found that Alabama's permits were "not as protective as the Federal CCR requirements." However, EPA's regulations are ambiguous; for example, 40 CFR § 257.91 only requires the owner or operator of a CCR unit to "install a groundwater monitoring system that consists of a *sufficient* number of wells, installed at *appropriate* locations and depths." In short, EPA's proposing to deny Alabama's CCR permit program because it views ADEM's interpretations of what are effectively EPA's CCR regulations as inconsistent with EPA's more recently announced interpretations. EPA's stated issues with ADEM's implementation of Alabama's CCR permit program are consistent with those relied on by EPA when it proposed to deny all of the CCR [Part A](#) and [Part B](#) demonstrations. Notably, EPA's interpretations in the Part A demonstrations are the subject of ongoing litigation by Utility Solid Waste Activities Group (USWAG) accusing EPA of engaging in illegal rulemaking.

Written comments on EPA's proposed denial are due on October 13, 2023. EPA also plans on holding an in-person public hearing on September 20, 2023, and a virtual public hearing on September 27, 2023.

EPA's Other Recent CCR-Related Regulatory Actions

EPA's proposed denial of Alabama's permit program is one of many steps EPA has taken recently to regulate CCR units throughout the nation. On March 29, 2023, EPA published a [proposed rule](#) to revise the technology-based effluent limitations guidelines and standards for the steam electric power generating point source category applicable to combustion residual leachate. And on May 18, 2023, EPA [proposed](#) to establish regulatory requirements for inactive surface impoundments at inactive CCR facilities. Additionally, EPA plans to issue a final rule in October of 2023, outlining a federal permit program for CCR facilities in states that do not have their own approved programs.

EPA has taken several recent actions to solidify its focus on CCR regulatory and enforcement matters and operators of CCR Rule-regulated units should be prepared for continued oversight by EPA. Babst Calland attorneys continue to track these developments and are available to assist you with CCR-related matters. For more information on this development and other waste matters, please contact Donald C. Bluedorn II at (412) 394-5450 or dbluedorn@babstcalland.com, Gary E. Steinbauer at (412) 394-6590 or gsteinbauer@babstcalland.com, Mackenzie M. Moyer at (412) 394-6578 or mmoyer@babstcalland.com, or any of our other [environmental attorneys](#).

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