

Recent Environmental Regulation of Coal Combustion Wastes - REVISED

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The federal Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901 *et seq.*, and its state counterparts, regulate the “cradle to grave” generation, storage, treatment, and disposal of “hazardous waste.” As a general rule, a “hazardous waste” is a “solid waste” that: (a) exhibits a “hazardous characteristic”; and/or (b) is specifically “listed” as a hazardous waste. See, 40 C.F.R. Part 261. If a material is a “hazardous waste” under this general rule, it is subject to a battery of environmental regulatory requirements from the time that it is “generated” until the time that it is finally “disposed.” See, 40 C.F.R. Parts 262 – 270.

Notwithstanding this general rule, when RCRA was enacted in 1976 Congress explicitly excluded the following materials from regulation as hazardous waste, regardless of whether they met the general rule, pending completion of a Report to Congress and a determination by the United States Environmental Protection Agency (“EPA”) to either promulgate regulations to manage the wastes as “hazardous,” or deem such regulations unwarranted: fly ash, bottom ash waste, slag waste, and flue emission control waste “generated primarily from the combustion of coal or other fossil fuels.” RCRA § 3001(b)(3)(A)(i); 42 U.S.C. § 6921(b)(3)(A)(i).

The first major rulemaking regarding these materials was in August of 1993, when EPA determined that it would not regulate as “hazardous” large-volume fossil fuel combustion wastes (fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste) generated at coal-fired electric utility and independent power producing facilities that manage the wastes separately from certain other low volume and uniquely associated coal combustion wastes. See, 58 Fed. Reg. 42466 (1993).

In a March 1999 report to Congress, EPA provided further clarification about the materials that it deemed covered by the 1993 rulemaking. Specifically, EPA offered the following definitions for the materials that are subject to the 1993 rule:

Fly ash - uncombusted material carried out of the boiler along with the flue gases.

Bottom ash - uncombusted material that settles to the bottom of the boiler. Bottom ash does not melt and, therefore, remains in the form of unconsolidated ash.

Boiler slag - uncombusted material that settles to the bottom of the boiler. Slag, unlike bottom ash, forms when operating temperatures exceed ash fusion temperature and remains in a molten state until it is drained from the boiler bottom.

Flue gas desulfurization waste - Waste produced during the process of removing sulfur oxide gases from the flue gases.

See, EPA Report to Congress, Wastes from the Combustion of Fossil Fuels (EPA 530-S-99-010)(March 1999).

In May of 2000, EPA addressed the “remaining wastes” (fossil fuel combustion wastes other than those exempt by the 1993 regulatory determination) and determined that the remaining wastes also would remain exempt from regulation as “hazardous.” These “remaining wastes” include:

- Large-volume coal combustion wastes generated at electric utility and independent power producing facilities that are co-managed together with certain other coal combustion wastes;
- Coal combustion wastes generated at non-utilities;
- Coal combustion wastes generated at facilities with fluidized bed combustion technology;
- Petroleum coke combustion wastes;
- Wastes from the combustion of mixtures of coal and other fuels (i.e., co-burning of coal and other fuels where coal is at least 50% of the total fuel);
- Wastes from the combustion of oil; and
- Wastes from the combustion of natural gas.

See, 65 Fed. Reg. 32214 (2000).

As part of the May 2000 rulemaking, EPA opined that “low volume” wastes that are “uniquely associated” with fossil fuel combustion are also exempt so long as they are co-managed with coal combustion wastes, but they are not exempt if they are not co-managed. These wastes include:

- Coal pile runoff;
- Coal mill rejects/pyrites;
- Air heater and precipitator washwater;
- Boiler fireside chemical cleaning waste;
- Floor and yard drains and sumps; and
- Wastewater treatment sludge.

Id. EPA further opined that the following wastes are not “uniquely associated” with fossil fuel combustion, and are not exempt regardless of whether they are co-managed with fossil fuel combustion wastes:

- Boiler blowdown;
- Cooling tower blowdown and sludge;
- Intake or makeup water treatment and regeneration wastes;
- Boiler waterside chemical cleaning waste;
- Laboratory wastes;
- General construction and demolition debris; and
- General maintenance wastes.

Based on this regulatory history, it appears clear that the “large volume” and “remaining” coal combustion wastes will continue to be regulated as “non-hazardous” for the foreseeable future. It also appears clear that “low volume” wastes that are uniquely associated with coal combustion wastes and that are co-managed with these coal combustion wastes will be regulated as “non-hazardous.” The issues that remain unclear, however, are: (1) the exact set of definitions for many of these terms; and (2) the nature of what constitutes acceptable “co-management.” These issues are likely to remain unclear for the foreseeable future, and may be the source for further EPA regulatory pronouncements and/or enforcement actions.