

NOVEMBER 11, 2024 | PUBLICATION

## Client Alert: The Ghosts of Coal Combustion Residuals

[Download Client Alert: The Ghosts of Coal Combustion Residuals](#)

### RELATED PROFESSIONALS

Amanda M. Leffler  
Michael E. Born  
Krystina E. Garabis  
Meagan R. Cyrus

### MEDIA CONTACT

Wendy M. Byrne  
wbyrne@shumaker.com

Halloween is over, but spooky season just began for anyone that owned, or now owns, a coal-fired power plant. If not already, these facilities should be frightened about the potential liability implicated by the Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals (CCR) from Electric Utilities; Legacy CCR Surface Impoundments, 89 FR 38950 (Legacy Rule)<sup>[1]</sup>. The rule opens a new realm of possible liabilities for owners of operating or retired coal-fired power plants.

The Legacy Rule builds upon, and amends, the national minimum criteria for existing and new CCR landfills and impoundments originally promulgated in 2015 (CCR Rules). Broadly, the CCR Rules impose criteria for the use and disposal of CCR through location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure and post-closure care, recordkeeping, notification, and internet posting requirements. The 2015 Rules were later amended in response to the D.C. Circuit Court's decision in *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. 2018) (USWAG Decision) through two rulemakings – Part A and Part B. The Legacy Rule similarly addresses the USWAG Decision by promulgating rules that address the previously excluded inactive surface impoundments at inactive facilities. Now, the CCR Rules, as revised by the Legacy Rule, generally apply to (1) inactive CCR surface impoundments at active facilities and legacy sites and (2) inactive and active facilities' CCR Management Units.

With U.S. EPA's authority to enforce the CCR Rules coming from the Resource Conservation and Recovery Act (RCRA) sections 3008, courtesy of the Water Infrastructure Improvements for the Nation (WIIN) Act, and 7003, U.S. EPA has significant discretion to initiate a wide range of enforcement actions. This, in addition to U.S. EPA's ability to seek a broad amount of information from a facility pursuant to RCRA section 3007, also thanks to the WIIN Act, as well as its public position that there is already widespread noncompliance of the CCR Rules amongst regulated facilities, suggests that U.S. EPA may consider most, if not all, retired and operational coal-fired power plants as out of compliance with the federal regulations. Considering this, it is likely that many facilities will be haunted by the ghosts of their CCR waste, regardless of when the facility closed. To mitigate this, owners and operators of these facilities should familiarize themselves with the regulations and understand that noncompliance with these rules may result in horrifically expensive liabilities associated with potentially unknown noncompliance.

If you would like any additional information regarding these statutes or have any questions, please reach out to a member of our team.

[1] Although the original federal register publication indicates the rule became effective November 4, 2024, U.S. EPA has since clarified that the rule becomes effective on November 8, 2024, *see* 89 FR 88650 (Nov. 8, 2024).