

## **Subtitle C Regulation of Coal Combustion Byproducts Will Result in the Hazardous Waste Regulation of Entities Handling and Using CCBs for Beneficial Use**

EPA is leaning strongly towards listing coal combustion byproducts, including fly ash, bottom ash, boiler slag, and flue gas desulfurization solids (including synthetic gypsum), as a RCRA Subtitle C hazardous waste. A proposed rule is due by the end of the year.

We understand that any such proposal would attempt to exclude certain coal combustion byproducts ("CCBs") beneficial uses from the full scope of any new regulatory program, most likely under a "conditional exclusion" from hazardous regulation which will require that CCBs are beneficially used and managed in a manner consistent with the requirements of the exclusion. We note further that only certain beneficial uses would qualify for this exclusion and that the existing options of beneficially using CCBs involving land application and other unconfined uses (*e.g.*, structural fill, agricultural use and soil amendment) would likely be prohibited.

Given that any of the remaining "beneficial use" exclusions would be conditioned on meeting certain prescribed conditions, it is important for marketers and end-users of CCBs, including wall board manufacturers and Portland cement plants, to understand that any Subtitle C program for CCBs would impose requirements directly on any entities handling and using CCBs for beneficial use (collectively "CCB Users"). We outline below certain of the conditions that would likely be imposed on CCB Users if CCBs are regulated as hazardous, as well as other non-regulatory liability issues that would attach to CCB Users under a Subtitle C framework.

1. Likely RCRA Requirements for CCB Users - Like any recycling exclusion from hazardous waste regulation, there will be regulatory conditions that must be met in order for CCBs that are beneficially used to be excluded from full hazardous waste regulation. See, for example, the conditions applicable to the existing exclusion from hazardous waste regulation for secondary materials that are reclaimed (*see* 40 C.F.R. § 261.4(a)(23)). Similar requirements would almost certainly be developed for CCBs destined for beneficial use to ensure that these "secondary materials" are properly managed prior to being incorporated into end products. Failure to meet any of the conditions of the exclusion would result in the CCB reverting back to a regulated hazardous waste, and the CCB User being immediately subject to RCRA hazardous waste controls. Some of these likely conditions are outlined below.

a. CCB Users will be required to manage CCBs in specific types of containers to prevent any release or dispersion of the material (including potentially fugitive dust); any release of the material would be viewed as illegal hazardous waste disposal, subjecting the CCB User to immediate RCRA liability for unlawful disposal of a hazardous waste (*e.g.*, the accidental spillage or release of CCBs prior to use at a wall board manufacturing plant). CCB Users would be required to clean up the spilled material and, assuming it cannot be used, handle it in accordance with all applicable RCRA generator, storage (*e.g.*, hazardous waste containers) and transportation requirements (*e.g.*, manifest).

b. CCB Users will likely be required to notify EPA of their status as "CCB users" and will have to ensure that the CCBs are not "speculatively accumulated" - *i.e.*, that the requisite amount of CCBs are used in a prescribed time period (no prolonged stockpiling at plants prior to incorporation into a final product). Any CCBs that are "speculatively accumulated" would automatically revert to hazardous waste status and would subject the CCB User to immediate hazardous waste generator and storage controls (*e.g.*, obtain a hazardous waste permit and requisite financial assurance and meet specified closure requirements).

c. Marketers of CCBs to the end-users likely will be required to conduct a prescribed amount of "due diligence" to ensure that any end-users will handle the material in a manner that is protective of human health and the environment and that the CCBs will in fact be managed in accordance with any end-use conditions. Failure to conduct the prescribed due diligence could result in the Marketer being subject to RCRA violations (as well as the end-users), as well as any other statutory and common law environmental liabilities resulting from the CCBs being mishandled by the end-user.

d. CCB Users will have to ensure that the CCBs are "legitimately used," including maintaining records and being able to demonstrate that the CCBs meet certain "legitimacy criteria," such as ensuring that the CCBs are handled in manner comparable to competing virgin materials and that the CCBs do not contain elevated levels of hazardous constituents (e.g., metals) not contained in competing virgin products. Failure to meet these criteria will constitute "sham recycling" and subject the CCB User to potential RCRA penalties for the improper disposal of a hazardous waste.

e. As is the case for other end-users of recycled materials excluded from RCRA regulation, wall board manufacturers, Portland Cement plants and other facilities that incorporate the CCBs into products would likely have to obtain financial assurance to ensure that funds are available for remediation in the event the CCBs are improperly discarded on-site (see, for example, the financial assurance requirements applicable to facilities using RCRA excluded materials for recycling; 40 C.F.R. § 261.4(a)(24)(vi)(F)).

2. Other Environmental Liabilities/Issues Applicable to CCB Users - In addition to having to comply with regulatory conditions to legitimately use CCBs under a Subtitle C program, the designation of CCBs as a hazardous waste - even if only for those CCBs that are disposed of - will expose CCB Users to other environmental liabilities and likely reduce the commercial markets for CCBs.

a. Increased Tort Exposure - The designation of CCBs as a hazardous waste will almost certainly increase the product liability/toxic tort exposure to CCB Users. Whether the end-use product is wall-board, Portland cement, or other non-land based building components, the end product incorporating the CCBs will often be used in residences and other building structures. The designation of CCBs as a federal "hazardous waste" - even if not technically applicable to CCBs that are beneficially used - will nonetheless designate the CCBs as "toxic material" and increase the exposure of CCB Users to product liability/toxic tort suits, including failure to warn cases, for any alleged health concerns associated with products containing CCBs. The designation of CCBs as a federal hazardous waste will provide strong "technical" evidence to toxic tort lawyers that end-use products containing CCBs are *per se* dangerous and pose a health threat to consumers and classes of plaintiffs.

b. Product Disposal - Another regulatory/liability concern arises when CCB-containing end use products are discarded. Because CCBs are listed hazardous waste when disposed of, any products made with CCBs could themselves be regulated for disposal as a hazardous waste. This could directly affect the regulatory status of off-specification CCB-containing products as well as the CCB-containing products that are disposed of after regular use (e.g., shingles and wallboard after demolition activities).

c. Reduced Markets – In part attributable to the designation of CCBs as a "listed hazardous waste," some existing reuse markets may be eliminated or shrink dramatically due to State laws prohibiting the reuse of "hazardous wastes" (*see e.g.*, state laws in Indiana, Iowa and Florida prohibiting or restricting the reuse of "hazardous waste"). Further, the designation of CCBs as a "hazardous waste" and the related toxic tort exposure likely will cause existing distributors and purchasers of CCB-containing products to re-evaluate and in some cases cease using these products. Thus, markets that are available today for the use of CCBs in wallboard, Portland cement, carpet, shingles and similar products are likely to be reduced, especially where CCBs are used in products where the end-use applications involve any potential exposure to the public. Markets also will be reduced because it is likely that any "legitimacy" criteria associated with the beneficial use of CCBs will require that the CCBs not contain elevated levels of specified constituents (*e.g.*, metals) not found in competing virgin materials.

d. Increased CERCLA Visibility - Listing CCBs as a federal hazardous waste will increase the visibility of CCBs as "CERCLA" hazardous substances and result in CCB Users being more readily identified as CERCLA "arrangers for disposal" (a category of a CERCLA PRP) if the CCBs are misused in a manner giving rise to CERCLA liability.