

Coal Plant Shutdowns: Taking Steps to Control the Reopener

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Operators shutting down coal-fired plants would be wise to plan ahead for potential future remediation obligations – aka the “reopener.” Predicting these obligations may be quite difficult, but operators can implement measures now to fully map site contamination and limit conditions that would trigger the reopening of remediation obligations.

Each year, some jurisdictions revise their cleanup requirements. Michigan, Pennsylvania and Alaska are revising their rules this year. Georgia, New Jersey and Texas revised their rules in 2015, and Delaware, Florida and Missouri did so in 2014. Without exception, these revised environmental remediation requirements are more restrictive. For example, in 2016 Michigan has proposed revisions to soil standards for Residential Drinking Water Protection that call for lead to drop to 180,000 parts per billion (ppb) from 700,000 ppb, for tert-butyl alcohol to drop to 22,000 ppb from 78,000 ppb, and for toluene to drop to 9,400 ppb from 16,000 ppb. (See [MI Proposed Rules](#) and [MI DEQ Seeks More Feedback](#).)

That the regulations change and get more restrictive is no surprise. For a shutdown coal plant, the specter of more restrictive cleanup standards in the future might counsel for implementing environmental closure sooner rather than later.

But there is a larger question too. Cleaning up today under less restrictive regulations does not change anything with respect to the soil and contaminants left in the ground. Satisfying the regulators today does not guarantee they will be satisfied tomorrow. If regulators implement a reopener, operators can face more cost and expense. Can anything be done today to prepare for a reopener? The answer is yes.

First, in negotiating the consent decree with regulators governing the cleanup of a plant site, it may be possible to restrict the scope of any reopener. While it is unlikely that the regulator will agree that the responsible plant operator can sign, complete the remediation and walk away from further obligations forever, an operator may be able to negotiate a threshold that must be exceeded before the regulator can reopen the remediation. For example, if the reopener threshold is set at 50%, an operator that left toluene in the ground in Michigan could avoid further expense since the new regulation (described above) reduces the regulatory limit by only 41%. A party that left lead in the ground may not be so confident.

Second, operators can set a contamination baseline using a sampling plan that goes beyond demarcating current regulatory levels, even possibly delineating out to background contamination. By so doing, if the regulatory limit changes, operators can know quickly the locations of any contaminated areas at issue, determine whether further investigation or costs are warranted, and assess the impacts of proposed and effected revisions to remediation standards.

Baseline sampling of course involves more than just taking more samples. It may require adjusting the design of the sampling plan. As noted by the Environmental Protection Agency (EPA):

Analysts should use systematic planning in order to collect data that will allow them to draw scientifically based conclusions. There are many cases in which data have been collected, but when the decision maker examines the data to draw conclusions, he or she finds that the data do not match the needs of the decision. Such problems can be avoided by using a systematic planning process to design the data collection.

The sampling plan required for the delineation and closeout of an ash pond may not be relevant to the sampling plan needed to convince a regulator that further investigation of a downwind adjacent area is not required.

Remediation of a shutdown coal plant is an expensive and time-consuming endeavor. Owners and operators that plan for the reopener may spend a little more on the front end, but they will be in much better control of their destiny should, as frequently occurs, regulators revisit remediation criteria.