Support for Legislation to Address Flaws in EPA’s Final Rule to Regulate Coal Combustion Residuals

On December 19, 2014, the Environmental Protection Agency (EPA) released its final rule to regulate coal combustion residuals (CCR or coal ash) generated from coal-fired electric utility plants as non-hazardous waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA). The new rule will take effect in the summer of 2015, with various requirements within it taking effect at a specified time period after the effective date. The final rule distinguishes between CCR disposal facilities that qualify as sanitary landfills and CCR disposal facilities classified as open dumps. CCR landfills and surface impoundments that are found to be in non-compliance will be deemed open dumps and have to rectify any regulatory deficiencies or cease receiving CCR and shut down.

While EPA correctly classified coal ash as non-hazardous waste, implementation of the rule will be flawed due to the self-implementing nature of Subtitle D of RCRA. Affected CCR facilities must comply with EPA’s new rule irrespective of whether the states they are located in adopt the federal rule at the state level. And even if states adopt the EPA rule and incorporate it into their solid waste management programs, the EPA rule remains in place as an independent set of federal criteria that must be complied with. Because the rule is promulgated under Subtitle D, regulated CCR facilities do not need to obtain permits, states are not required to adopt and implement the new rule, and the new rule cannot be enforced by EPA. Rather, the only means of enforcement is through citizen suits in federal district court under Section 7002 of RCRA against any facility that is alleged to be in non-compliance with the new requirements. This is problematic because legal disputes regarding compliance with any aspect of the rule will be determined on a case-by-case basis by different federal district courts across the country. This will result in federal judges making complex technical decisions on how to comply with the rule rather than technical experts at regulatory agencies. Further, by overriding existing state risk-based regulatory programs, the rule subjects billions of dollars of electric generating assets to a “comply or shutdown” enforcement regimen without opportunity for remediation or appeal.

For example, the rule applies to inactive CCR surface impoundments (i.e., those not receiving CCR on or after the effective date of the rule and which still contain CCR and liquid) at active electric utilities regardless of fuel currently used at the facility to produce the electricity. Should the inactive impoundment not close within three years of the effective date of the rule, it is regulated in the same manner as existing CCR surface impoundments and is subject to the rule’s full array of requirements, including location restrictions and groundwater monitoring. EPA does not appear to have the authority to
regulate inactive surface impoundments in this manner under Subtitle D of RCRA. It is not clear why
EPA chose this approach for inactive impoundments given it can regulate them under the Comprehensive
Environmental Response, Compensation, and Liability Act or the imminent and substantial endangerment
provision of RCRA.

In addition, while EPA chose to regulate CCR under Subtitle D, the preamble to the rule made it very
clear that the agency is still in the process of evaluating whether to reverse its CCR Bevill regulatory
determination and regulate CCR under Subtitle C of RCRA. EPA has “reserved the right” to decide in
the future to regulate CCR as hazardous waste, stating it needs to evaluate the “potential effect of
pollution control technologies on the CCR characteristics, and the appropriate IRIS value of arsenic.” In
the preamble, the agency stated there is “the very real potential for significant changes in CCR
characteristics and constituents in the near future, due to the required installation of pollution control
technologies.” EPA provides no timeline for when it might make such a regulatory determination, thus
leaving open the real possibility of replacing the new Subtitle D rules with Subtitle C hazardous waste
regulations for CCR. This continues the regulatory uncertainty of beneficially using CCR in a host of
products, including concrete, wallboard, bricks, roofing materials, and other products. Rather than
encourage the continued reuse of CCR, the rule has the potentially perverse effect of discouraging such
beneficial reuse, thus sending more CCR to landfills and impoundments.

NOW BE IT RESOLVED: That the American Public Power Association (APPA) supports the
Environmental Protection Agency’s (EPA) decision to regulate coal combustion residuals (CCR) as non-
nhazardous waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA); and

NOW BE IT FURTHER RESOLVED: That APPA supports legislation to address the flaws in EPA’s
final rule on issues such as the lack of state enforcement authority, the lack of state flexibility to establish
site-specific corrective action remedies, and the tenuous status of the agency’s Bevill regulatory
determination that CCR is non-hazardous waste, among others.

As adopted June 9, 2015, by the membership of the American Public Power Association at its
annual meeting in Minneapolis, Minnesota.