

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

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

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

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26 For example, the rule applies to inactive CCR surface impoundments (*i.e.*, those not receiving CCR on or
27 after the effective date of the rule and which still contain CCR and liquid) at active electric utilities
28 regardless of fuel currently used at the facility to produce the electricity. Should the inactive
29 impoundment not close within three years of the effective date of the rule, it is regulated in the same
30 manner as existing CCR surface impoundments and is subject to the rule’s full array of requirements,
31 including location restrictions and groundwater monitoring. EPA does not appear to have the authority to

32 regulate inactive surface impoundments in this manner under Subtitle D of RCRA. It is not clear why
33 EPA chose this approach for inactive impoundments given it can regulate them under the Comprehensive
34 Environmental Response, Compensation, and Liability Act or the imminent and substantial endangerment
35 provision of RCRA.

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

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

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55 **NOW BE IT FURTHER RESOLVED:** That APPA supports legislation to address the flaws in EPA’s
56 final rule on issues such as the lack of state enforcement authority, the lack of state flexibility to establish
57 site-specific corrective action remedies, and the tenuous status of the agency’s Bevill regulatory
58 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.**