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EPA Docket Center  
U.S. Environmental Protection Agency  
WJC West Building, Room 3334  
1301 Constitution Avenue NW  
Washington, D.C. 20460

**American Coalition for Clean Coal Electricity Comments on EPA's Proposal  
to Revise the Coal Combustion Residuals Rule**

The American Coalition for Clean Coal Electricity (ACCCE) submits the following comments on a proposed rule to revise the current federal rules to regulate the disposal of coal combustion residuals (CCR) under Subtitle D of the Resource Conservation and Recovery Act (RCRA).<sup>1</sup>

In the proposed rule, the Environmental Protection Agency (EPA or Agency) seeks comments on a wide range of important issues, including the extension of key CCR compliance dates and the revision of onerous and prescriptive requirements to reflect fundamental changes in the statutory basis for implementing and enforcing the CCR rule. For the reasons discussed below, ACCCE urges prompt Agency action to finalize these important changes to the CCR rule as quickly as possible. EPA's failure to take swift action to finalize these proposed changes will leave existing coal-fired power plants with no choice but to comply over the next six months with the current inflexible CCR requirements—which, in turn, could force not only the mandatory closure of many surface impoundments, but also the premature shutdown of many coal-fired power plants. *Over the past 12 months, ACCCE and others have urged EPA to move expeditiously in making changes to the CCR rule but with very limited success. Therefore, we once again urge the Agency to act with a sense of urgency.*

ACCCE is a non-profit organization that is the only national trade organization whose sole mission is to advocate at the federal and state levels on behalf of coal-fueled electricity and the coal fleet. It is made up of members representing every facet of the coal-fueled electricity industry, including electricity generators, coal producers, railroads, barge operators, and equipment manufacturers.<sup>2</sup>

**EPA must immediately revise the CCR rule to avoid more coal retirements.**

It is vitally important to preserve the fleet of existing coal-fired power plants. The importance of the existing coal fleet was recently reaffirmed by the Department of Energy (DOE), the National Energy Technology Laboratory (NETL), the Federal Energy Regulatory Commission (FERC), and the North American Electric Reliability Corporation (NERC). These organizations have recognized the critical reliability and resiliency attributes the coal fleet provides to the electric grid and have expressed concerns about the impact of the changing electricity mix on grid reliability and resiliency.<sup>3</sup>

Unfortunately, the imposition of the current, highly inflexible, CCR regime would cause substantial additional retirements of existing coal-fired generation that, in turn, will increase risks to the reliability and resilience of the nation's electric grid. So far, more than 111,000 megawatts (MW) of coal-fired generating capacity have retired or announced plans to retire since 2010. This represents more than one-third of the U.S. coal fleet.<sup>4</sup> These retirements pose an increasing threat to grid reliability and resilience. It is especially important to preserve fuel-secure sources of electricity such as the coal fleet. FERC has initiated a resilience proceeding that could lead to steps to help preserve the coal fleet. Obviously, it would be detrimental for the CCR rule to cause the retirement of coal-fueled generating units whose fuel security attribute is later determined to be necessary for maintaining grid reliability and resilience.

EPA should not exacerbate this disturbing trend in coal plant retirements with prescriptive and inflexible CCR requirements that are not necessary for protection of human health and the environment. For these reasons, it is imperative that EPA take immediate action to ensure this CCR regulatory regime does not threaten the electric grid by causing the premature shutdown of even more fuel-secure coal-fueled generating capacity.

**EPA should stay or extend key CCR compliance deadlines as quickly as possible.** In the proposed rule, EPA has requested comment on whether the current deadlines should be extended for completing groundwater monitoring analysis and meeting the location restrictions in light of the recently passed Water Infrastructure Improvement Act (WIIN Act)<sup>5</sup> and potential regulatory changes being advanced in its proposal.<sup>6</sup> As a general matter, ACCCE strongly supports EPA's efforts to extend these important deadlines in order to avoid coal-fueled power plants from having to make major irreversible capital and operational decisions based on the existing one-size-fits-all requirements of the CCR rule – particularly given those requirements are likely to change once EPA issues a final CCR rule by the end of this year.

ACCCE's strong preference is for the Agency to issue an administrative stay of at least the upcoming compliance deadlines for completing the assessment monitoring obligations and meeting the location restrictions of the CCR rule.<sup>7</sup> There are strong

legal grounds for EPA doing so under section 705 of the Administrative Procedure Act (APA).<sup>8</sup> Furthermore, the issuance of an administrative stay under APA section 705 is especially appropriate in the case of the groundwater monitoring requirements given pending court review on how the alternative groundwater protection standards are to be established under 40 C.F.R. § 257.95(h).<sup>9</sup>

If EPA determines that the issuance of an administrative stay is not possible, then it is essential for EPA to take prompt action to finalize the proposed deadline extensions for meeting groundwater monitoring and location restriction requirements. EPA clearly has ample legal authority to extend the compliance dates by rulemaking due to the fact that EPA is reconsidering and proposing to amend its earlier final CCR regulations. It is not unusual for federal agencies to have issued final notice-and-comment rulemakings that change the effective or compliance dates for an earlier final regulation and that explicitly justify the extension of the effective or compliance dates based on the fact that the agency is reconsidering or amending its earlier final regulation. EPA, for example, has done this many times under the Clean Air Act and other federal environmental statutes.<sup>10</sup>

Finally, we cannot emphasize enough that quick action is necessary to fix the substantive requirements of the final CCR rule, including the adoption of the risk-based alternatives for site-specific tailoring of the current CCR requirements. ACCCE's preference is for the Agency to complete a final rulemaking action to adopt these substantive regulatory changes prior to July 2018. If, however, EPA is unable to complete such a rulemaking within this timeframe, ACCCE urges EPA to move forward with a rulemaking that focuses solely on formally extending the compliance dates of these key requirements.

In such a case, it makes sense for EPA to take final action on the substantive rule changes raised in the proposed CCR rule in a second rulemaking so that final Agency action on substantive changes will not unnecessarily delay final action on the deadline extensions. Furthermore, this two-step approach will provide EPA with additional time to work through and take final action on a significant number of complex substantive issues pursuant to the second rulemaking.

**EPA should not impose closure requirements for non-CCR waste streams.**

The 2015 final CCR rule mandates the closure of any unlined surface impoundment that exceeds a groundwater protection standard or is not complying with any of the location restrictions.<sup>11</sup> If such an impoundment triggers one of these mandatory closure requirements for cause, the impoundment must cease receiving both CCR **and** non-CCR waste streams within six months of an event triggering closure. The current regulations at 40 C.F.R. § 257.103 provide a limited exception to this requirement if there is an absence of alternative CCR disposal capacity. In the proposed rule, EPA has for the first time interpreted that these alternative closure requirements may

authorize an extension of the six-month closure deadline for **only** CCR, but not non-CCR, waste streams.<sup>12</sup>

This is a new interpretation that could have the extreme effect of shutting down coal-fueled power plants that have no alternative system for discharging non-CCR waste streams. Even for those generating facilities that may be able to engineer a temporary solution to receive their wastewater streams until they are able to construct alternative non-CCR disposal capacity, these solutions may be extremely expensive and place significant operational constraints on plant operations.

ACCCE urges EPA to withdraw this new policy in its entirety and revert to its longstanding practice of allowing the co-management of CCR and non-CCR waste streams. The following is a brief summary of the most compelling policy reasons for EPA to remove these onerous and prescriptive closure requirements for non-CCR waste streams from CCR regulatory program.

First, there is insufficient time to construct new impoundments of wastewater treatment systems in many circumstances. Upon triggering forced closure under the CCR rule, plant operators must cease placement of both CCR and non-CCR waste streams into the CCR surface impoundment within six months. This triggering event could occur as early as this summer if the impoundment exceeds a groundwater protection standard and this fall if there is a violation of location restriction. In these circumstances, operators of coal-fueled power plants simply will not be able to develop the alternative waste water management capacity needed to manage their non-CCR waste streams within this six-month period.<sup>13</sup>

As EPA itself is aware, “the law cannot compel actions that are physically impossible, and it is incumbent on EPA to develop a regulation that does not in essence establish such a standard.”<sup>14</sup> If EPA moves forward with the implementation of these non-CCR closure requirements, this course of action will leave many power plants in the untenable position of having to either continue operating in violation of the CCR rule or cease generating electricity that may be necessary to ensure the reliability and resiliency of the electric grid.

Second, the risk of power disruptions greatly outweigh the minimal environmental risks that might accrue during the extension provided due to the absence of alternative disposal capacity. This minimal risk was in fact reflected when EPA evaluated the co-management of CCR and non-CCR waste streams when it performed CCR surface impoundment risk assessment in the CCR Rule. Since virtually all CCR surface impoundments evaluated in the risk assessment also receive non-CCR wastes, the Agency has already confirmed that minimal environmental risks would result from CCR impoundments continuing to operate for a short period of time while receiving non-CCR wastes.<sup>15</sup> By contrast, the Agency determined that “the risks to the wider

community from the disruption of power over the short-term outweigh the risks associated with the increased groundwater contamination from continued use of these units.”<sup>16</sup> It is hard to reconcile these EPA statements with the non-CCR closure requirements that could force shutdown of coal-fueled power plants due to short-term compliance issues.

Third, EPA has recognized the importance of coordinating the compliance deadlines of the CCR rule with other major environmental requirements applicable to coal-fired EGUs. In the final 2015 rule, EPA determined that the best course of action was to coordinate the major compliance deadlines of the CCR rule with those of the Effluent Limitations Guidelines (ELG) rule and the Clean Power Plan (CPP). The Agency’s rationale was that it did not make sense to force coal plant operators to make costly CCR upgrades before understanding the requirements and impacts of these two other major environmental rules. Both of these rules are under review and are likely to be revised or replaced by the EPA.<sup>17</sup> The compliance deadlines for bottom ash transport water and FGD scrubber wastewater have been extended by two years, while the Agency reviews and likely revises the ELG rule discharge limitations for those two wastewater streams through a reconsideration rulemaking. Similarly, EPA is in the process of repealing the CPP and evaluating whether to replace it with an entirely new rule. An extension of non-CCR closure requirements is therefore necessary and appropriate so that plant operators will have additional time to coordinate their CCR compliance options for non-CCR waste streams with those of the ELG rule and any CPP replacement rule. In other words, EPA should allow plant operators to extend the deadline for developing alternative disposal capacity for non-CCR waste streams as long as lawfully possible in order to allow operators to fully understand the likely compliance options.

For the preceding reasons, EPA should clarify in the final rule that a lawfully operating CCR disposal facility can continue to co-manage CCR and non-CCR waste streams. This approach is consistent with longstanding EPA policy and industry practice and should apply to any unlined surface impoundments that have qualified for the current deadline extension under 40 C.F.R. § 257.103 due to a lack of alternative disposal capacity. These impoundments serve critical wastewater management functions, and the failure to account for these non-CCR waste streams threatens the continued operation of affected power plants and the provision of power to the public. Therefore, the non-CCR closure provisions must be clarified immediately to ensure that plant operators may continue to use their impoundments to manage non-CCR waste streams.<sup>18</sup>

**EPA should adopt risk-based alternatives for tailoring CCR requirements to account for site-specific conditions.** One core element of the proposed CCR rule is to adopt many of the key risk-based alternatives that are codified at 40 C.F.R. Part

258 of the Municipal Solid Waste Landfill Regulations (MSWLF). The incorporation of these alternatives into the federal CCR program is critically important to operators of coal-fueled power plants because they allow for the tailoring of the federal CCR requirements to the site conditions and risks of each particular CCR disposal facility at any coal-fueled power plant. As EPA itself has recognized many times,<sup>19</sup> allowing plant operators to tailor many of these inflexible and prescriptive requirements of the CCR rule makes good policy sense. For example, tailoring groundwater monitoring and corrective action requirements will avoid imposing one-size-fits, overly-conservative requirements that can unnecessarily impose tremendous operational costs on coal-fired EGUs and threaten the premature closure of CCR disposal facilities in many cases.

At the time EPA adopted the final CCR rule in 2015, EPA declined to adopt these site-specific, risk-based provisions of the MSWLF program due to statutory limitations placed on the regulation of CCR waste streams under Subtitle D of the RCRA. These limitations precluded EPA from implementing the CCR requirements through state or federal permit programs. As a result, EPA was forced to establish a self-implementing regulatory scheme in which plant operators themselves were required to administer and comply with the CCR requirements without any direct regulatory oversight by either EPA or states. Due to this lack of regulatory oversight, EPA concluded that it was “impossible to include some of the alternatives available in [the MSWLF program], which establish alternative standards that allow a state, as part of its permit program to tailor the default requirements to account for site specific conditions at the individual facility.”<sup>20</sup>

EPA’s decision not to adopt these risk-based alternatives has resulted in the establishment of inflexible and overly prescriptive CCR requirements reflecting worse-case risk assumptions, rather than tailoring those requirements with the actual risks posed by each particular CCR disposal facility.<sup>21</sup> Moreover, these inflexible and overly-conservative requirements of the 2015 final CCR rule are unnecessarily imposing tremendous operational costs on coal-fueled power plants and threatening the premature closure of CCR disposal units in many cases.

To correct this problem, ACCCE urges EPA to adopt each of the following MSWLF risk-based alternatives that EPA is now proposing to adopt for ensuring flexible, site-specific implementation of the CCR requirements:

- Establishment of risk-based groundwater protection standards for constituents without maximum contaminant levels;
- Selection of modified corrective action remedies that do not require closure of the impoundment or other such corrective action measures that would not result in any meaningful environmental benefit;

- Modification of various groundwater monitoring requirements to reflect site-specific factors, such as the suspension of groundwater monitoring requirements where there is no potential for migration of contaminants;
- Use of an alternate period of time for demonstrating compliance with corrective action based on specified regulatory criteria that take into account site-specific conditions; and
- Allow for a decrease in the length of the post-closure period to reflect risk-based considerations of specific sites.

**Plant operators must be allowed to use risk-based alternatives during self-implementation.** It critically important that plant operators be allowed to use these new risk-based alternatives during the initial self-implementation period before states or EPA establish and begin to administer a CCR permit program. The failure for EPA to do so will mean that the rule changes will have no practical effect since the key compliance deadlines for the requirements being replaced by the risk-based alternatives will have already passed before the implementation of state or EPA permit programs.

Furthermore, EPA has ample legal authority to provide the necessary regulatory oversight that will assure the full and proper implementation of the proposed alternative risk-based requirements during this initial self-implementation period. With the passage of the WIIN Act, Congress has provided EPA with broad inspection and enforcement authorities under section 3007 and 3008 of RCRA to administer the federal CCR requirements directly on affected CCR disposal facilities.<sup>22</sup> These new statutory authorities clearly allow EPA to gather and analyze any relevant information and data that may be necessary for assessing and assuring compliance with applicable CCR requirements.

In conclusion, ACCCE appreciates the opportunity to submit these comments on the proposed CCR rule. Should you have any questions, please contact me at [Pbailey@americaspower.org](mailto:Pbailey@americaspower.org).

Sincerely,



Paul Bailey  
President and Chief Executive Officer

Attachment: List of ACCCE Board Members

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<sup>1</sup>*Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One)*, 83 Fed. Reg. 11,584 (March 15, 2018).

<sup>2</sup> A list of ACCCE members is attached.

<sup>3</sup> See e.g., Perry, Rick, “Secretary of Energy’s Direction . . .,” Received by Neil Chatterjee, Cheryl LaFleur, and Robert Powelson, September 28, 2017; Federal Energy Regulatory Commission, Department of Energy, “Grid Resiliency Pricing Rule,” Notice of Proposed Rulemaking, 82 Fed. Reg. 46940 (October 10, 2017); NERC, “Comments of the North American Electric Reliability Corporation in Response to Notice of Proposed Rulemaking,” October 23, 2017; NERC, *2017 Long Term Reliability Assessment*.

<sup>4</sup> ACCCE, Retirement of U.S. Coal-Fired Generating Units, January 2018.

<sup>5</sup> Public Law No: 114-322. The WIIN Act was enacted into law on December 16, 2016 and, among other things, amended Subtitle D of RCRA to authorize states and EPA to implement the 2015 final CCR rule through permit programs, as well as to provide EPA with additional oversight and enforcement authorities.

<sup>6</sup> See 83 Fed. Reg. at 11,599 (EPA seeking comment on proposal to extend deadline for performing the groundwater monitoring analysis for completing assessment monitoring); *id.* at 11,598, 11,600 (EPA seeking comment on proposal to extend location restriction deadlines).

<sup>7</sup> In particular, this includes the requirement for completing the statistical evaluation of the groundwater monitoring data under 40 C.F.R. § 257.95(d).

<sup>8</sup> While the D.C. Circuit last year rejected an administrative stay of the oil and gas methane rule under section 307(d)(7)(B) of the Clean Air Act (CAA), *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017), an administrative stay of CCR deadlines would be pursuant section 705 of the Administrative Procedure Act, and not the CAA. A stay pursuant to the APA would therefore not be subject to the restrictions identified by the D.C. Circuit for CAA section 307(d)(7)(B) stays.

<sup>9</sup> APA section 705 authorizes a federal agency to “postpone the effective date of an action pending judicial review” when that agency “finds that justice so requires.” With respect to the groundwater monitoring requirements, these requirements for the issuance of stay under APA section 705 are clearly satisfied given that this one of legal issues in the pending USWAG legal challenge of the 2015 final CCR rule. Furthermore, the deadlines for completing these groundwater monitoring requirements have not yet passed and that the postponement of those deadlines is therefore clearly necessary to preserve status quo and avoid irreparable harm in light of the significant capital expenditures and adverse operational impacts of triggering the mandatory closure requirements under 40 C.F.R. §257.101(a)(1).

<sup>10</sup> See, e.g., *Approval and Promulgation of Air Quality Implementation Plans; Nevada; Regional Haze Federal Implementation Plan; Extension of BART Compliance Date for Reid Gardner Generating Station*, 78 Fed. Reg. 53,033 (Aug. 28, 2013); *Loan Originator Compensation Requirements Under the Truth in Lending Act Regulation Z*; *Prohibition on Financing Credit Insurance Premiums; Delay of Effective Date*, 78 Fed. Reg. 32,547 (May 31, 2013); *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Inclusion of Fugitive Emissions; Final Rule; Stay*, 75 Fed. Reg. 16,012 (Mar. 31, 2010); *Medicaid Program: State Flexibility for Medicaid Benefit Packages and Premiums and Cost Sharing*, 74 Fed. Reg. 62,501 (Nov. 30, 2009); *Oil Pollution Prevention; Non-Transportation Related Onshore Facilities; Spill Prevention, Control, and Countermeasure Rule-- Final Amendments*, 74 Fed. Reg. 14736 (Apr. 1, 2009).

<sup>11</sup> See 40 C.F.R. § 257.101(a)(1) (mandatory closure requirement for exceeding groundwater protection standard); *id.*, at §257.101(b)(1) (mandatory closure requirement for failing to demonstrate compliance with a location restriction).

<sup>12</sup> 83 Fed. Reg. at 11,594 (stating that under current closure provisions of the 1975 CCR Rule, “owners or operators may continue to place CCR, and only CCR, in a unit designated to close for cause for an extended period of time”).

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<sup>13</sup> For example, development of new wastewater treatment capacity is typically a lengthy process that involves the design, procurement, construction, and startup of the new treatment system...

<sup>14</sup> 80 Fed. Reg. at 21,423.

<sup>15</sup> In particular, EPA stated in the final CCR rule that these environmental “risks are mitigated by all of the other requirements of the rule with which the facility must continue to comply, including the requirements to continue groundwater monitoring and corrective action.” 80 Fed. Reg. at 21,423.

<sup>16</sup> 80 Fed. Reg. at 21,423.

<sup>17</sup> 80 Fed. Reg. at 21,428.

<sup>18</sup> If EPA believes that it must add a new provision to set alternative closure requirements for non-CCR waste streams, it should allow the impoundment to receive non-CCR waste streams so long as the impoundment is authorized to receive CCR under the alternative closure provisions of the CCR rule.

<sup>19</sup> See 83 Fed. Reg. at 11,597; 75 Fed. at 2524-25. See also 56 Fed. Reg. 50978, 50,095-96 (October 9, 1991) (final MSWLF regulations).

<sup>20</sup> 80 Fed. Reg. at 21,396-97.

<sup>21</sup> EPA readily acknowledged this point when it removed the risk-based alternatives from the 2015 final CCR rule. For example, the Agency recognized that it may be possible at certain sites to engineer an alternative to closure of the unit that would adequately control the source of the contamination and would otherwise protect human health and the environment.” 80 Fed. Reg. at 21,371. However, the Agency concluded that “the regulatory structure under which this rule is issued effectively limits the Agency’s ability to develop those types of risk-based requirements that can be individually tailored to accommodate particular site conditions.” *Id.*

<sup>22</sup> Section 4005(d)(4)(A).

**ATTACHMENT**



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## **Board Members**

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