**COAL ASH AMENDMENT (Section 2301 OF “WIIN”)**

***“State Programs For Control Of Coal Combustion Residuals”***

**SUMMARY OF AMENDMENT**

Section 2301 of the “Water Infrastructure Improvements for the Nation Act” (WIIN)[[1]](#footnote-1) amends section 4005 of the Resource Conservation and Recovery Act (RCRA) to allow EPA to approve state programs that operate in lieu of the federal coal combustion residuals (CCR) rule.[[2]](#footnote-2) The intent of the amendment is to allow states to run coal ash programs without the concurrent operation of the federal rule. The amendment thus transforms EPA’s self-implementing CCR rule into EPA-authorized state permit programs. While turning the CCR rule over to states is likely to result in the weakening of some provisions, the scheme is not without ground rules.

For example, EPA may only approve a state CCR program if the state incorporates the requirements of EPA’s CCR rule or establishes regulations that are "at least as protective" as the EPA rule. In states that do not adopt programs, the self-implementing CCR rule remains in effect.

Further, the amendment guarantees that EPA retains rulemaking authority to regulate coal ash under RCRA, and EPA is free to strengthen regulations in the future and even to regulate coal ash as a hazardous waste. The amendment also provides EPA with first-ever authority to enforce CCR requirements. In addition, it establishes citizen suit authority to enforce state program requirements in authorized states and maintains citizens’ rights to enforce the CCR rule in the absence of state programs.

Finally, the amendment requires EPA to review state CCR programs periodically, and EPA can withdraw a state program when requirements are not as protective as the CCR rule, when a state fails to adequately implement a program, and when one state’s coal ash management threatens to adversely affect another state.

While the amendment could have done much more to secure and protect a federal baseline for state programs and permits, the legislation creates rights and opportunities that will help us maintain the protections afforded by the CCR rule, while creating opportunities for strengthening the scheme in the future.

**STATUS OF EPA’S CURRENT CCR RULE**

EPA’s CCR rule remains in effect in all statesuntil EPA has approved a state program and the state has issued a permit for the CCR unit. In the absence of an approved program and permit, owners and operators must continue to comply with the federal rule*.* Also during this time, EPA, as well as citizens and states, have authority to enforce the CCR rule.

**STATE APPROVAL PROCESS**

After a state submits its program to EPA for approval, EPA has 180 days to make a determination to approve or disapprove, subject to public notice and comment*.* EPA shall approve a program, if it determines that the program requires each CCR unit located in the state to comply with either the CCR rule or requirements that EPA determines are as least as protective. EPA shall also approve programs that allow states to include technical standards for individual permits that differ from the CCR rule, based on site-specific conditions, if EPA first determines that the standards are at least as protective as the CCR rule. EPA’s decisions are reviewable under the Administrative Procedure Act, and these determinations, no doubt, will be the subject of litigation.

**STATES THAT DO NOT ADMINISTER COAL ASH PROGRAMS**

In states that don’t adopt programs or that have programs withdrawn by EPA (see below), EPA has authority to establish a federal permit program, and EPA must do so, if funding is authorized by Congress. If EPA does not administer a permit program, the self-implementing rule applies.

**EPA ENFORCEMENT AND CITIZEN ENFORCEMENT AUTHORITY**

EPA has enforcement and inspection authority in all states, which is the first time that EPA has such authority for non-hazardous wastes. Citizens continue to have rights to bring suits in federal court using the citizen suit provision of RCRA. Specifically:

• In states with EPA-approved programs: Citizens can bring suits to enforce permit provisions. EPA can also enforce when it determines that such action “is likely to be necessary” to ensure compliance, after considering “other administrative or judicial enforcement action.”

• In states where EPA administers the permit programs, EPA enforces the program, and both states and citizens can bring citizen suits.

• In states without a State or EPA-administered program, the CCR rule remains in effect and can be enforced by citizens, states and EPA.

• On Indian lands, EPA must administer and enforce a CCR permit program, which can also be enforced by citizen suit.

**EPA CONTINUES TO HAVE RULEMAKING AUTHORITY**

The amendment preserves EPA’s rulemaking authority over coal ash. Nothing prevents EPA from revisiting the Bevill determination and regulating coal ash as a hazardous waste. The amendment also does not affect EPA’s authority to establish financial assurance requirements for CCR sites under CERCLA § 108(b) or RCRA.

**EPA’S MANDATE TO REVIEW AND WITHDRAW STATE PERMIT PROGRAMS**

• **Requirement to review state programs:** EPA must review state programs at least every 12 years, as well as not later than 3 years after revising the CCR rule, not later than 1 year after a “significant release,” and on the request of any state threatened with adverse impacts from the release of CCR from another state’s coal ash units.

• **Requirement to withdraw deficient programs:** EPA must withdraw state programs that it determines are not requiring each CCR unit to comply with the federal CCR rule and are not being adequately implemented (e.g., when states fail to enforce or issue deficient permits).

**• Requirement to withdraw programs that threaten interstate pollution:** EPA must withdraw a state program if it determines that a state has approved or failed to revoke a permit where a release is likely to adversely affect the soil or water of another state.

**SHORT AND LONG-TERM IMPACTS:** For most of 2017, the CCR rule will remain in effect, but eventually most states will submit programs to EPA. The approval process must be very closely monitored because a Trump EPA is likely to approve programs that are not “at least at protective” as the CCR rule. To protect health and the environment in those states, it will be necessary to litigate to maintain the critical protections of the federal rule.

1. <https://www.congress.gov/bill/114th-congress/senate-bill/612/text#toc-H91A0B3DCF1D14C6C92588DDAA897B03B> [↑](#footnote-ref-1)
2. *See* 40 C.F.R. Part 257, Subpart D, effective October 19, 2015 (80 Fed. Reg. 21,302). [↑](#footnote-ref-2)