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Re: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program

The American Coal Council (or ACC) submits these comments in response to the Environmental Protection Agency's (EPA) Federal Register Notice of February 20, 2020 regarding its proposal to establish a federal coal combustion residuals (CCR) permit program for electric utilities in accordance with the requirements of the Water Infrastructure Improvements for the Nation (WIIN) Act.

The ACC is a nonprofit trade association in its 38th year representing the collective business interests of the American coal industry. Our members include coal suppliers and energy traders, utilities and independent power providers, industrial consumers, transportation companies, terminals, and support services suppliers. Since our member companies touch every aspect of turning one of America's most abundant energy resources into reliable and affordable electricity for the United States economy, our Association has first-hand knowledge of the direct and indirect impacts of coal-related regulations and a unique, "boots on the ground" perspective. Coal is also integral to the steel-making process and the industrial production of cement, chemicals, and paper. Our diverse membership base encompasses the entire coal supply chain, and it is from this broad perspective that we assess the impacts of regulations impacting coal supply and use. While ACC provides these comments from that broad perspective, individual member companies of ACC may submit separate comments on their own behalf that offer additional or other views.

Background and General Comments

The WIIN Act was passed by Congress and signed by the President in December 2016. It gave states the authority to establish permitting programs for CCR units in lieu of federal requirements and provided EPA the authority to review and approve the programs submitted by states which would then operate in lieu of the federal requirements.

EPA's proposed federal permit program would apply for all CCR units in nonparticipating states and in Indian country. The WIIN Act defines "nonparticipating state" as a state (1) without an approved CCR program, (2) which has not submitted evidence of a CCR program for approval, (3) which has provided notice of intent to relinquish approval of a CCR program, or (4) for which EPA has withdrawn previously granted approval of a CCR program. To date, only the states of Oklahoma and Georgia have EPA-approved permit programs.

The American Coal Council supports the prompt implementation of a federal CCR permit program. At the same time, we encourage EPA to continue to promptly approve state-submitted programs in response to the WIIN Act. We believe state-level programs will be the most effective means of regulating CCR units, but the federal CCR permit program is important to provide for permits to be issued while states continue to pursue CCR permit authorization under the WIIN Act.

Regulatory efficiency is crucial to the continued operation of coal power plants and the management of their combustion products including the beneficial use of those products. The importance of America's existing coal power plant fleet continues to be demonstrated and validated.

The coronavirus pandemic emerging earlier this year in the U.S. is a major public health threat. In its COVID-19 response, the U.S. Department of Homeland Security (DHS) reinforced the coal supply chain, from the mines to transportation to coal-fueled power plants, as essential infrastructure. The fundamental importance of providing electricity 24/7 could not be more evident than in the images of dedicated staff caring for patients in medical facilities around the country. The reliable supply of electricity has also provided continuity to families and schools with a sudden need to shift to working and educating on a virtual basis. The coronavirus pandemic underscores the need for a diverse mix of power sector generating resources to support electricity reliability and resilience across a variety of foreseeable and unforeseeable situations.

Our nation's coal plants are critical assets that directly support the reliability and resilience of the electric grid. They are dispatchable so they can operate anytime 24/7. They store inventory onsite so they are fuel secure. They are ready to be deployed as needed to assure that electricity supply meets demand every minute.

Likewise, the coronavirus pandemic has been accompanied by widespread, deeply negative impacts to employment and our economy. It has also amplified the importance

of U.S. manufacturing. Programs and policies for re-starting the economy, job creation, and bringing industry and manufacturing back from offshore are in strong focus by government leaders. Retaining our existing U.S. coal power plants is important to our future manufacturing competitiveness. A diverse generation portfolio including coal, which acts as both a market and operational hedge, protects reliable, resilient electricity and affordable prices for all consumers. This will be especially important to economic recovery.

Unfortunately, coal plants continue to be closed and retired. EPA recognized this in the economic analysis in its Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 108(b) rulemaking for the electric power industry last year. EPA referred to 40 percent of U.S. coal power plant capacity being shut down or designated for closure since 2010. EPA's economic analysis in the CERCLA rulemaking also stated that approximately 85 plants (or 18 percent of coal generation) open in 2014 have closed or converted to another fuel type.

Many of the coal plant closures and conversions are attributed to EPA regulations. According to the U.S. Energy Information Administration, coal plant closures reached a high in 2015 driven in part by EPA's Mercury and Air Toxics Standards (MATS) rule.¹ That regulation took effect in April 2015. The United States Supreme Court struck it down just a few months later, deeming it inappropriate for EPA to impose billions in economic costs for a few dollars of health or environmental benefits. Despite the high court ruling, it was too late for many coal plants. The power sector had been forced to choose between installing emissions controls or closing the affected coal units well before the Supreme Court's ruling due to the April 2015 compliance deadline. The MATS rule is a clear example of the significant impacts of regulations.

This EPA federal permitting program for CCR is important to the efficient permitting and management of CCR facilities at coal power plant sites, and by extension to retaining existing coal plants to support a reliable, resilient electric grid. In the section below, ACC's provides additional comments on elements of EPA's proposed program.

Specific Comments on the Federal CCR Permit Program

First, ACC agrees with EPA that the WIIN Act gives EPA discretion to establish permit procedures for CCR facilities and ACC believes that that EPA has reasonably considered other federal permitting programs in establishing permitting procedures for CCR facilities. EPA proposes to establish three types of permits in this federal permitting program – a general permit, an individual permit, or a permit by rule. These are appropriate to address the different types of CCR units, and additionally ACC suggests EPA create a general permit category for the federal program that would also serve as an option for state CCR programs.

¹ U.S. Energy Information Administration, "Today in Energy", December 28, 2018.

ACC generally supports the tiered permitting approach for CCR facilities, but cautions that eighteen months to complete an individual permit application may not provide sufficient time for some units. Therefore, the application process should provide for an extension of time as needed.

ACC agrees that all CCR beneficial use practices are excluded from the federal CCR permit program. Other categories of CCR management practices not subject to the permit program should be specified as excluded as well, including landfills that stopped receiving CCR before October 19, 2015, placement of CCR at active or abandoned underground or surface coal mines, and historic beneficial use practices.

EPA's proposal to include an "omnibus" provision that would allow permit writers to impose permit requirements on CCR units above and beyond the criteria in the CCR rule is inappropriate as there is no delegation of such authority to EPA in the WIIN Act.

ACC agrees with EPA that compliance with a CCR permit serves as compliance with the protectiveness standard under RCRA Subtitle D and acts as "permit shield" from enforcement, including from RCRA citizen suits.

EPA's inclusion of "compliance schedules" in permits to allow facilities facing compliance challenges to take steps to achieve compliance is reasonable. This is an element of other federal permit programs and is appropriate for the federal CCR permit program. It is also very important that the option for a compliance schedule be available throughout the life of the permit, not just at the time the permit is issued.

EPA proposes that permits under this program should be issued without an expiration date to enable them to remain in effect throughout the active life and all stages of CCR facilities. This includes the post-closure care period and with regard to completion of all corrective action. ACC is in agreement with this approach. It eliminates the burden of unnecessary permit renewals and provides for permit terms to remain in effect until modified, revoked and reissued, or terminated. EPA's proposal also makes clear that permit conditions must be updated as necessary during the life of the permit. This ensures EPA will receive updated information about the operations of each permitted unit, as EPA would have received such updated information in a permit renewal process if the permit had an expiration date.

Along with establishing a federal CCR permit program and EPA's continuing approvals of state CCR permit programs, EPA should finalize the risk-based criteria and compliance options provided in its proposed "Phase One" CCR rule revisions, including risk-based corrective action. As EPA has concluded, risk-based compliance based on site-specific conditions of CCR facilities is appropriate.

Conclusion

ACC appreciates the opportunity to submit these comments on EPA's proposed federal permit program for CCR, which EPA would implement directly in Indian country and at

CCR units located in states that have not submitted their own CCR permit programs for approval.

We believe state-level programs will be the most effective means of regulating CCR units, but the federal CCR permit program is important to provide for permits to be issued while states continue to pursue CCR permit authorization in accordance with the WIIN Act.

Regulatory clarity, certainty, flexibility, and timing are critically important to the existing U.S. coal power plant fleet and the effective operation and management of CCR facilities.

ACC supports the prompt implementation of a federal CCR permit program and we encourage EPA in parallel to continue prompt approval of state-submitted programs authorized under the WIIN Act.