

State Programs for "Coal Ash" Disposal in the WIIN Act

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The Water Infrastructure Improvements for the Nation Act ([WIIN Act](#)) would authorize a broad range of water resource and water quality activities. Section 2301 would amend the Solid Waste Disposal Act (more commonly referred to by its 1976 amendment, the Resource Conservation and Recovery Act, or RCRA). Section 2301 would establish a framework for the Environmental Protection Agency (EPA) to approve state programs implementing federal standards applicable to the disposal of coal combustion residuals (CCR, or "[coal ash](#)") generated by electric utilities. Currently under RCRA, those federal standards are enforceable primarily by citizen lawsuits.

Some members of the regulated community have expressed concern over the uncertainty associated with enforcement by citizen suit. Others have expressed concern that, absent some mechanism to encourage states to implement the federal standards, enforcement by citizen suit is inadequate to ensure that risks associated with CCR disposal are consistently addressed. Proponents of Section 2301 assert that the RCRA amendment could address those concerns, which have been contentious for some time.

Background

On April 15, 2015, EPA issued a [final rule](#) establishing federal standards for CCR disposal. The standards, at [40 C.F.R. Part 257, Subpart D](#), went into effect October 19, 2015. (See CRS Insight IN10583, [Overview of EPA Standards for "Coal Ash" Disposal](#).) EPA promulgated the standards under existing RCRA authorities that require the agency to establish criteria necessary to distinguish between sanitary landfills and open dumps. (See the "[Statutory Authority](#)" section, page 21310 of the preamble to EPA's final rule.) Waste management practices that constitute open dumping are [prohibited under RCRA Section 4005\(a\)](#).

In accordance with its longstanding interpretation of RCRA's authorities, EPA asserts that it can neither enforce its CCR disposal standards nor direct states to implement them. Instead, requirements related to RCRA's open dumping prohibition are enforceable by states or citizens under [RCRA's citizen suit](#) authority. Alternatively, states could adopt and enforce the federal regulations under their independent enforcement authority. (See the "[Implementation](#)" section, page 21309 of the preamble.) Owner/operators of CCR disposal facilities that do not comply with applicable federal standards would violate RCRA's open dumping prohibition. However, unless the facility is in a state that adopted the

federal standards, its non-compliance would be subject to some enforcement action via citizen suit.

EPA encourages states to adopt and implement standards at least as stringent as EPA's to ensure that risks associated with improper CCR disposal are addressed. Specifically, [EPA recommends](#) that states revise their existing Solid Waste Management Plans (SWMP) to demonstrate how they will ensure compliance with RCRA's open dumping prohibition with respect to CCR disposal. Under existing procedures established in RCRA, EPA could approve a state SWMP that implements CCR disposal standards that meet or exceed the federal criteria. [EPA anticipates](#) that a facility operating in accord with an EPA-approved SWMP will be able to beneficially use that fact if a citizen suit is brought to enforce the federal criteria.

State CCR Disposal Programs Under Section 2301

Section 2301 of the WIIN Act would establish state/EPA programs to control CCR disposal that would be similar to programs currently used to regulate municipal solid waste (MSW) landfills. The program to regulate MSW landfills was established according to directives and authorities in the Hazardous and Solid Waste Amendments of 1984 (HSWA; [P.L. 98-616](#)). In the debate leading up to HSWA, Congress recognized that it may not be practical to regulate certain wastes under the federal hazardous waste management program (established under RCRA Subtitle C) but that excluding such waste does not mean its disposal poses no hazard.

HSWA amendments to RCRA Subtitle D provided new mechanisms (apart from citizen suits) to enforce the open dumping prohibition at facilities that may accept hazardous household waste (HHW). Specifically, HSWA added [Section 4010](#) to Subtitle D, which includes directive to EPA to revise existing sanitary landfill criteria (in 40 C.F.R. 257) to establish criteria applicable to disposal facilities that may receive HHW. EPA then promulgated MSW landfill criteria in 49 C.F.R. Part 258. To ensure compliance with those criteria, HSWA also amended the RCRA provisions prohibiting open dumping by adding [Section 4005\(c\)](#), which:

- directed states to implement permit programs to assure facility compliance with the MSW landfill criteria;
- directed EPA to determine whether each state's program was adequate; and
- allowed EPA to use existing RCRA authorities in Subtitle C (related to inspection and federal enforcement) to enforce the open dumping prohibition (i.e., enforce the MSW landfill criteria) in states without an approved permit program.

Currently, all states regulate MSW landfills in accordance with permit programs approved by EPA. That approval indicates that the state provided documentation to EPA that demonstrates it adopted and can enforce landfill standards that are at least as protective as the federal standards. That is, a state regulatory program implemented in accordance with standards approved by EPA is one that would not violate the RCRA open dumping prohibition. Section 2301 would amend RCRA's open dumping provisions in a similar way to implement CCR disposal standards. Key provisions in Section 2301 would add a Section 4005(d) to RCRA that would:

- establish a process for states to seek and EPA to approve a state's program regulating CCR disposal, conditioned on EPA determining that the state would implement requirements at least as protective as applicable federal standards;
- specify conditions under which EPA could withdraw approval of state programs;
- explicitly allow EPA to use existing authorities in RCRA to enforce the open dumping prohibition in states that do not have or choose not to seek an EPA-approved program to regulate CCR; and
- specify that a disposal unit operating in accordance with an EPA-approved state CCR permit program would be a sanitary landfill (i.e., not an open dump).

Sponsors of the proposed amendment to RCRA say that it may encourage safe disposal of CCR and protect utilities from lawsuits. This is similar to EPA's assertion that state adoption of CCR regulatory programs, implemented via an EPA-approved SWMP, would also reduce risks from CCR disposal and protect facilities from citizen suits.