

February 7, 2025

Via Electronic Correspondence (Sakow.Rick@epa.gov)

Mr. Richard Sakow
Environmental Protection Agency, Region 9
75 Hawthorne St.
San Francisco, CA 94105

**RE: EPA, Notice of Intent to File a Complaint Pursuant to Section 3008(a)
Of the Resource Conservation and Recovery Act (RCRA),
Apache Generating Station**

Dear Mr. Sakow:

Arizona Electric Power Cooperative, Inc. (AEPCO) is in receipt of the letter from the Environmental Protection Agency (EPA) dated January 7, 2025 (the January Letter) regarding EPA's intent to issue a civil administrative complaint against AEPCO pursuant to Section 3008(a) of RCRA for alleged violations of 40 CFR Part 257 Subpart D, known as the Coal Combustion Residuals (CCR) Rule. The January Letter invites AEPCO to "advise EPA of substantial reasons not to proceed" with filing the complaint. AEPCO identifies a myriad of reasons not to proceed in this letter (the Response).

AEPCO and EPA are currently in discussions to resolve the issues raised in the Notice of Violation (NOV) letter dated July 12, 2024. In fact, certain issues raised in the NOV were first discussed with EPA in May 2022 upon AEPCO's own initiative, and there has been cooperative engagement since that time. AEPCO appreciates the ongoing discussions with EPA and looks forward to meeting with EPA.

The January Letter states that EPA plans to file a complaint within 30 days. However, we acknowledge EPA Region 9's informal communications with AEPCO to indicate that EPA does not actually plan to file a Complaint within the next 30 calendar days. We understand EPA intends to continue discussions with AEPCO. Nonetheless, AEPCO submits this information for EPA's consideration should settlement become unachievable.

I. AEPCO's Response to the January Letter

AEPCO reviewed the allegations identified in the NOV and in the January Letter. AEPCO refutes these allegations and presents reasons why a Complaint should not be filed against the cooperative. AEPCO asks EPA for reconsideration of its approach and dismissal of the allegations identified in the NOV and January Letter, in their entirety. In addition, the January Letter suggests that EPA may intend to rely on information AEPCO marked "Federal Rule of Evidence (FRE) Privilege 408," provided during our cooperative engagement. If this is the case AEPCO objects

[http://azgt/sites/AZGT/enviro/Managed Documents/CCR/NOV 07122024/AEPCO - Response on Show Cause Letter \(rev 02-07-25\).docx](http://azgt/sites/AZGT/enviro/Managed Documents/CCR/NOV 07122024/AEPCO - Response on Show Cause Letter (rev 02-07-25).docx)

February 7, 2025

**Arizona Electric Power Cooperative, Inc. • Sierra Southwest Cooperative Services, Inc.
P.O. Box 670 • 1000 S. Highway 80 • Benson, Arizona 85602 • (520) 586-3631 Phone • www.azgt.coop**

ED_018475D_00003756-00001

Sierra Club FOIA Request:
2025-EPA-04193

SC_EVERSPLIT0007638

to the use of these marked materials for non-settlement purposes. Their use is prohibited to prove or disprove a disputed claim. Finally, this Response does not address the detailed technical and legal issues inherent in EPA's allegations. The parties have actively discussed these issues over the course of meetings, and AEPCO has generated FRE-privileged responsive documents in EPA's custody.

AEPCO provides the following mitigating and/or exculpatory information but reserves the opportunity to provide additional information later in the proceedings, as appropriate.

1. AEPCO is a not-for-profit rural electric cooperative that qualifies as a small business.

AEPCO is a small rural, consumer-owned not-for-profit generation and transmission electric utility cooperative headquartered in Benson, Arizona. AEPCO is considered a small utility by the Federal Energy Regulatory Commission and a small business by the Small Business Administration. AEPCO's purpose is to generate electricity and transmit it to distribution cooperatives that distribute it to end-use member-consumers in Arizona, New Mexico, and California. AEPCO provides wholesale energy and services to six distribution cooperatives that participate and rely on AEPCO's electric generation services. AEPCO is fully owned, operated, and governed by its members who use the energy and services AEPCO provides. The member cooperatives to which AEPCO provides energy serve approximately 420,000 residential, agricultural, and industrial member-consumers. AEPCO's service area includes cost-sensitive rural and disadvantaged communities. The impacts of regulatory costs have a direct impact on the not-for-profit electric cooperative and its rural end users.

AEPCO is at an unprecedented time in its history. As part of the energy transition, AEPCO has embarked on the construction of new generation assets to meet demand and reduce its emissions footprint. While the projects involve federal funding (disbursement currently paused), AEPCO has and must continue to outlay substantial financial resources to complete the projects over the coming years. These financial circumstances must be considered and also viewed in the context of substantial outlay of expenses to comply with the new CCR Legacy Rule. In summary, AEPCO's small business status and financial commitments should be considered as a factor in any penalty assessed by EPA.

2. EPA's allegations are rooted in technical differences that should be resolved as part of a permitting program, or at a minimum, cooperatively without a penalty.

The CCR Rule was designed as a self-implementing rule from its inception. In fact, EPA recently reiterated its confidence in delegating technical matters to engineers. In the Legacy Rule, the agency notes, "As stated in the 2015 CCR Rule preamble, the Agency maintains that an engineer is able to give fair and technical review because of the oversight programs established by the State licensing boards" 89 Fed. Reg. at 39058. Consistent with the self-implementing framework, AEPCO relied on qualified professional engineers and technical experts to assure compliance.

Nonetheless, in CCR-regulated sites across the country, EPA is challenging site-specific decisions made by these experts. Many of the bases of these enforcement efforts consist of one-size-fits-all programmatic decisions on very site-specific issues. Here, EPA is following suit. EPA is challenging AEPCO on site-specific decisions such as sufficiency of the groundwater monitoring network, validity of the statistical approaches chosen (interwell vs. intrawell), and the technical bases of alternate source demonstrations (ASDs).

Unfortunately, EPA approvals of state CCR permitting programs have been scarce, and the federal CCR program rulemaking has stalled. Without a permitting program in place, enforcement is presently serving as an ill-fitting substitute for the organic collaboration between the agency and a regulated party on technical waste management and disposal points that would normally occur in the permitting process. The result of this nation-wide movement prioritizes penalizing over permitting. It results in the complete disregard for the self-implementing structure of the Rule. Indeed, AEPCO finds itself defending technical decisions, some made more than ten years ago when the Apache monitoring well network was established and certified by a qualified professional engineer. This approach should be abandoned.

Finally, “deterrence” is the first goal identified in EPA’s Civil Penalty Policy. *See* RCRA Penalty Policy Memorandum dated June 23, 2003 (RCRA Policy) at 6 (citing Policy Pt. 1-1 in the Revised General Enforcement Policy Compendium). This goal is not achieved by using the enforcement process to challenge technical disagreements. If a party believes it is in compliance because it has relied on sound judgments by technical experts, then there is no deterrent effect. In AEPCO’s case, the cooperative has and continues to assert that it is in compliance with the CCR Rule. Using the enforcement process to resolve technical disagreements misses the main goal of EPA’s enforcement process altogether.

AEPCO asks EPA for reconsideration of its approach and dismissal of the allegations identified in the NOV and January Letter. Highly technical discussions are best suited for the permitting process. This would allow actual violations to be parsed from compliance wish lists. EPA should use the permitting process to resolve the AEPCO NOV allegations that concern groundwater monitoring system requirements, establishment of background groundwater quality, and the alleged failure to establish an assessment monitoring program, at a minimum. Or, in the alternative, AEPCO asks EPA to pursue a compliance plan approach without a civil penalty.

3. EPA’s liner non-compliance allegation arose after AEPCO voluntarily sought compliance guidance from EPA.

In April 2022, AEPCO specifically reached out to EPA headquarters regarding the agency’s interpretation of the Alternative Composite Liner Certification (ALC) provisions of the CCR Rule. EPA and AEPCO met virtually on May 11, 2022. The solitary purpose of the meeting was to solicit EPA feedback on its interpretation of the ALC lower component requirements (e.g., inclusion of native soils) and to present a proposed methodology to calculate the hydraulic conductivity mathematical formula in the CCR Rule. At that time, AEPCO had not withdrawn its Part B Application.

EPA did not provide feedback on the regulatory interpretation of the ALC provisions at the meeting. EPA did not state that the liner only includes the compacted layer and not native soils, in its view. EPA could have clearly conveyed its position that native soils should not be used, especially if this interpretation is as “clear” as EPA suggests in the NOV. On June 13, 2022, AEPCO certified and posted its Alternative Composite Liner Certification. EPA did not provide correspondence regarding the ACL until EPA’s Part B letter, dated January 25, 2023.

This sequence of events should be considered as a mitigating factor in AEPCO’s favor. AEPCO approached EPA in good faith to discuss and confer with the agency before any regulatory decisions were made. Had EPA rejected AEPCO’s ALC interpretation in 2022, AEPCO’s decision-making would have changed. Indeed, the purpose of approaching EPA was to ensure AEPCO was pursuing an acceptable regulatory path.

4. No environmental harm has occurred.

AEPCO has presented overwhelming evidence that storage of CCR in the impoundments does not have a reasonable probability of adverse effects on health or the environment. The site setting is in the arid southwest. There are no surface water bodies near the composite-lined Coal Combustion Waste Disposal Facility (CWDF), and the plant does not discharge effluent. Beneath the Apache CWDF is a perched aquifer at a depth of approximately 90 feet below the surface extending laterally under Ash Ponds 1-4. The regional aquifer is the uppermost aquifer for the remainder of the CWDF. It is over 250 feet below the surface of Scrubber Pond 2. In addition to evidence that the CWDF is not leaking, AEPCO has shown that it is mathematically impossible for contamination to have traveled 90 feet or over 250 feet to either aquifer in the 30 years since AEPCO began storing CCR in the composite-lined CWDF. The lack of environmental harm is a mitigating factor.

5. AEPCO has cooperatively engaged with EPA on all issues in the NOV and acted in good faith to comply with the CCR Rule.

This is not a situation of negligence or willful disregard. AEPCO has consistently acted in good faith to implement a robust and protective CCR compliance program at Apache. AEPCO initiated the CCR program with a nationally-recognized outside consultant to site and develop the groundwater monitoring network at Apache. Since that time, AEPCO has utilized the assistance of three nationally-recognized consulting firms to develop and implement requirements in the Rule. AEPCO also exercised third-party personnel redundancy on high-profile projects as a quality assurance measure. AEPCO actively engages in voluntary overcompliance, such as collecting additional groundwater monitoring data (cations and anions) in routine sampling events and conducting an isotope study. AEPCO has a strong record of activities that demonstrate the cooperative’s good faith efforts to comply with the CCR Rule.

6. AEPCO’s situation is unique.

Enforcement discretion allows for EPA’s consideration of special circumstances. RCRA Policy at 3, 40. The following facts create unique factors:

- The Apache CWDF is a composite-lined impoundment, with a mechanically compacted layer, and a substantial thick layer of similar native soils in the subsurface protecting the aquifer at sufficient hydraulic conductivities. The high-density polyethylene (HDPE) geomembrane liner has a 60-mil thickness at the bottom (meeting the CCR Rule requirements) and 80-mil on the side slopes of each pond at the CWDF (which is more protective than required by the CCR Rule). The D.C. Circuit recognized the protectiveness of composite liners, stating that “composite lining . . . effectively eliminates the risk of groundwater contamination.” *USWAG v. EPA*, 901 F.3d 404, 422 (citing EPA, Human & Ecological Risk Assessment of Coal Combustion Residuals, at 4-8 to 4-9).
- The underlying native soils being questioned by EPA were tested using the process and methodologies developed by EPA in the Part B Rule. The results demonstrate that the composite liner for the CWDF impoundments is more protective than the minimum required liner for the CCR Rule (1) due to the presence of the HDPE geomembrane liner, (2) the data collected on the underlying soils, and the liquid flow rate equation EPA included in the CCR Rule.
- The Apache CWDF has been under consistent regulatory oversight, monitoring, and reporting since its inception. The Arizona Aquifer Protection Program (APP) required initial permitting along with ongoing groundwater monitoring, reporting and oversight of the Apache CWDF since the 1990s. There has been no evidence of groundwater impacts during the pendency of the APP program.
- Burns & McDonnell engineered the Apache CWDF composite liner system in the 1990s to demonstrate Best Available Demonstrated Control Technology (BADCT). BADCT is defined as the reduction of the discharge of pollutants to the greatest degree achievable before they reach the aquifer or to prevent pollutants from reaching the aquifer. To achieve this standard, Burns & McDonnell was charged with using engineering controls, processes, operating methods, and other alternatives, including site-specific characteristics.
- Apache is a unique southwestern site with a hydrogeology influenced by the Willcox Playa. This geologic feature is well documented (including by other federal agencies) and makes the hydrogeology and site geochemistry more complex.
- EPA’s allegations regarding the ALC do not have national significance to the program. AEPCO is unaware of any other composite-lined facility that can support an ALC calculation. There is no precedential effect.

AEPCO appreciates your consideration of the information in this Response. We look forward to continued dialogue with EPA.

Sincerely,



Michelle Freeark

Executive Director of Regulatory Affairs and Corporate Services

cc: Ms. Lydia Dorrance, EPA Region 9 (dorrance.lydia@epa.gov)
Ms. Brianna Fairbanks, EPA Region 9 (fairbanks.brianna@epa.gov)
Ms. Liz Williamson, Balch & Bingham LLP (cwilliamson@balch.com)
Ms. Robin Thomas, ADEQ (thomas.robin@azdeq.gov)