

April 30, 2018

Ms. Mary Jackson
Office of Resource Conservation and Recovery
U.S. Environmental Protection Agency
Room: 5304P
Washington, DC 20460



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Docket ID: EPA-HQ-OLEM-2017-0286
Submitted electronically via www.regulations.gov

RE: Comments of the American Public Power Association on the Environmental Protection Agency's Hazardous and Solid Waste Management Systems: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One); Proposed Rule (83 Fed. Reg. 11,584, March 15, 2018)

Dear Ms. Jackson:

The American Public Power Association (APPA or Association) appreciates the opportunity to submit these comments in response to the Environmental Protection Agency's (EPA or Agency) proposed rule Hazardous and Solid Waste Management Systems: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One) (Proposed Rule or Phase One Proposed Rule).¹

The Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. The Association advocates and advises on electricity policy,

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

technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

Association members own and operate Coal Combustion Residuals (CCR) disposal units subject to the requirements of the CCR regulations at 40 C.F.R. Part 257, Subpart D (CCR rule), or, if approved by the EPA, the requirements of a state CCR permit program or other system of prior approval.² EPA's Proposed Rule seeks to revise fundamental elements of the CCR Rule that will ultimately impact its implementation and enforcement.

Association members are working with states who have either agreed or are contemplating implementing their own CCR state permit program, therefore, Association members have a direct interest in the Proposed Rule. The Association is a member of the Utility Solid Waste Activities Group (USWAG) and supports its technical and legal comments on this matter.³

I. Introduction

The Proposed Rule seeks to address (1) several issues arising from the Agency's judicial remand of certain provisions in the CCR Rule related to a settlement agreement to address claims arising from litigation, (2) revisions associated with a petition for reconsideration, (3) the passage of the Water Infrastructure Improvements for the Nation (WIIN) Act, and (4) the use of CCR during certain closure situations.^{4,5} The WIIN Act amended the Resource Conservation and Recovery Act (RCRA) Subtitle D with respect to the CCR Rule, by authorizing states to

² 80 Fed. Reg. 21302 (April 17, 2015).

³ Comments of the Utility Solid Waste Activities Group on Hazardous and Solid Waste Management System disposal of Coal Combustion Residuals from Electric Utilities: Amendments to the National Minimum Criteria (USWAG Phase One Comments).

⁴ *USWAG et. al. v. EPA*, No. 15-1219 (D.C. Circuit 2015).

⁵ 83 Fed. Reg. 11585.

administer the rule through permit programs *in lieu* of the federal CCR Rule and directed EPA to do so, based on appropriations, in states that choose not to do so (non-participating states).

Due to the passage of the WIIN Act, EPA now has direct oversight of inspections, information requests, and enforcements thus ensuring the RCRA Subtitle D protectiveness standards, of ensuring no reasonable probability of adverse effects to health or the environment from the disposal of CCR, are met. EPA's Proposed Rule recognizes that the amendments to RCRA in the WIIN Act now support the incorporation of risk-based performance standards similar to those in the municipal solid waste landfill (MSWLF) program, under 40 C.F.R Part 258. The Association supports the use of risk-based performance standards to regulate the disposal of CCR and would urge EPA to extend the 2015 CCR Rule compliance deadlines so utilities can implement some of the flexibilities contemplated by the Proposal Rule.

II. The Proposed Changes Require EPA to Extend Certain Compliance Deadlines As Soon As Possible Pending Completion of the Rulemaking

EPA is proposing to amend several substantive provisions in the CCR Rule making it essential that EPA extend the upcoming compliance dates for the assessment monitoring program and aquifer separation location restrictions to avoid facilities making irrevocable decisions based upon compliance obligations that may change. EPA recognizes an extension may be warranted by requesting comment on the appropriateness of the October 17, 2018 compliance deadline.⁶ Extending these compliance deadlines will give the Agency time to finalize these important proposed revisions. Further, an extension will provide states the ability to tailor elements of the CCR Rule through state and/or EPA permitting programs under the WIIN Act. Given the Proposed Rule contemplates extending these deadlines, there is ample

⁶ 83 Fed. Reg. 11598-99.

precedent for the Agency to finalize these extensions on grounds that it is reconsidering the CCR Rule.⁷ As a practical matter, failing to extend the compliance deadlines will mean that the proposal's risk-based performance standards will do little good because utilities will have already made irreversible decisions based on the existing one-size fits all standards.

Extending the compliance deadlines for assessment monitoring and location restrictions in the CCR Rule is further warranted given EPA's plan to reconsider the final Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source (ELG Rule).⁸ EPA plans to issue final revisions to the ELG Rule by September 2020. Both the CCR Rule and the ELG Rule directly impact the management of CCR wastestreams and the operation of CCR surface impoundments. In the final 2015 CCR Rule, the Agency acknowledged the need to closely coordinate these two rulemakings to minimize the overall complexity of the two regulatory programs and to facilitate implementation and engineering of financial and permitting activities.⁹ Now that the timeframes in the ELG Rule have been extended, EPA must too extend the timeframes in the CCR Rule to ensure continued coordination between the two rules and to allow owners and operators of CCR units to make informed decisions on key operational changes. The Association would encourage EPA to carefully consider aligning the timeframe of these two rules.¹⁰

⁷ See EPA's Response to Court Order in *Air Alliance Houston v. EPA*, No. 17-1155 (D.C. Cir 2015), April 6, 2018.

⁸ See EPA's Letter Granting Reconsideration of 2015 Steam Electric ELG, "Petition for Agency Reconsideration and Stay of Effluent Guidelines for the Steam Electric Point Source Category", April 12, 2017.

⁹ 80 Fed. Reg. 21313.

¹⁰ Coordination of the CCR Rule timeframes with the ELG Rule may be somewhat ameliorated should EPA incorporate risk-based standards in the self-implementing rule and extend the deadlines for assessment monitoring and aquifer location restrictions.

a. The Agency Should Extend the Assessment Monitoring Timelines

The assessment monitoring program timelines should be extended to allow utilities to establish risk-based groundwater protection standards (GWPS) for Appendix IV constituents without maximum contaminate levels (MCLs). Additional time is appropriate to also allow utilities to incorporate risk-based flexibility into the CCR Rule's corrective action program, as modeled after MSWLF regulations. A review of the Rule's existing timeframe illustrates the need for extended timelines.

On October 17, 2017, facilities were required to initiate groundwater monitoring.¹¹ The CCR Rule's groundwater monitoring program is implemented in stages and facilities are just now determining whether their detection monitoring results require assessment monitoring to begin. As facilities proceed to set up their assessment monitoring programs, the Rule's trigger for corrective action and forced closure approaches quickly. For facilities that detected a statistically significant increase (SSI) over background during detection monitoring and did not attempt to make an alternative source demonstration under § 257.94(e)(2), the requirement to begin statistically evaluating assessment monitoring data to assess whether any Appendix IV constituents have been detected at a statistically significant level (SSL) above the applicable GWPS is July 16, 2018.¹² This analysis must be completed within 90 days, or no later than October 15, 2018.¹³ If it is determined that the data shows an Appendix IV constituent has exceeded the GWPS at an SSL on October 15, 2018, then, among other things, utilities will have to characterize the nature and extent of the release and evaluate any relevant site conditions that

¹¹ § 257.90(b).

¹² See EPA's January 26, 2018 response to UWAG's letter clarifying that facilities have 90 days to conduct a statistical evaluation of groundwater monitoring data generated under assessment monitoring. The applicable GWPS also must be established on this date (EPA-USWAG Letter).

¹³ See EPA-USWAG letter at 2.

may affect selecting a remedy. It is unlikely EPA will finalize this Proposed Rule by the deadline for initiating the statistical evaluation. Therefore, the deadline must be extended because the Proposed Rule contemplates changing the very GWPS against which a facility must evaluate its groundwater data to determine whether it must implement corrective action or close a CCR unit.

The Association is supportive of extending the compliance deadlines for assessment monitoring until after EPA finalizes the alternative, risk-based performance standards. A 120-day extension should be sufficient time to establish GWPS after the Proposed Rule is finalized. During this time, utilities would undertake the necessary technical and risk analysis procedures to develop site-specific, risk-based GWPS. Further, utilities would use this time to ensure risk-based corrective action procedures are in place and well understood, if corrective action is triggered.

b. The Agency Should Extend the Existing Surface Impoundment Aquifer Location Restrictions Deadlines

EPA is seeking comment on whether to amend the compliance deadlines for the location restrictions in the CCR Rule or whether an alternative deadline, either through a permit program established under the WIIN Act or one that applies directly to a facility during this interim period, is appropriate, given the Proposed Rule.¹⁴ Further, EPA seeks comment on whether a state or owner/operator, through detailed technical analysis or certification(s) by an independent professional engineer, could establish alternative location restrictions that would satisfy RCRA Subtitle D protectiveness standards. The CCR Rule currently requires CCR units be located a minimum of five feet above the upper most aquifer, unless it can be demonstrated that there is not “an intermittent, recurring or sustained hydraulic connection between the CCR unit and the

¹⁴ 83 Fed. Red. 11598.

upper most aquifer.”¹⁵ If a CCR unit cannot make this demonstration, it must cease the receipt of CCR and non-CCR wastestreams within six months and initiate closure.^{16,17} Here too, it is appropriate for EPA to extend the October 17, 2018 deadline for existing surface impoundments to meet the aquifer location restrictions. It will take time to design and implement alternative measures and it is unlikely that permit writers or qualified experts will have developed alternatives before the October 17, 2018 deadline. Experts will need to evaluate site-specific groundwater hydrology and risks to drinking water receptors, combined with corrective action measures, to meet Subtitle D protectiveness standards. EPA should specify that the timeframe to demonstrate that an existing surface impoundment meets the aquifer location restriction be based upon EPA’s issuance of the final rule allowing for an alternative, risk-based option for meeting this condition. Similar to the assessment monitoring timeframe, 120 days would allow states to issue alternative conditions in individual CCR permits where the rule is self-implementing. CCR units would be forced to close under the current location restrictions unless the proposed changes are finalized.

III. It is Necessary that Risk-Based Tailoring be Allowed While the Rule is Self-Implementing

The 2015 CCR Rule promulgated under RCRA Subtitle D did not allow for the Rule to be implemented through state or a federal permit programs, thus it was “self-implementing.” Self-implementing means owners and operators of coal-fired power plants were responsible for determining for themselves what is required to comply with the CCR Rule and then certify their compliance by posting information on a publicly-available website. EPA declined to finalize

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Non-CCR wastestreams can include low volume wastewater from non-coal units, e.g. natural gas combined cycles that use the CCR unit for treatment.

many site-specific, risk-based provisions included in other state and federal solid waste programs, based upon the fact that there would be no enforceable permit program. The lack of site-specific considerations has resulted in an overly conservative rule that is inflicting operational costs on the electric utility industry and is causing the premature closure of CCR disposal units.

The passage of the WIIN Act fundamentally changed enforcement under the CCR Rule. The WIIN Act grants EPA new authority to directly bring enforcement actions against facilities it finds to be in non-compliance with the CCR Rule. Therefore, EPA's original rationale for not including site-specific, risk-based performance standards is no longer appropriate.

Ultimately, EPA or the states will implement the CCR Rule through permit programs, but it will take time for this transition to occur. During this transition, it is critical that the risk-based elements of the Proposed Rule be included in the existing, self-implementing rule. Risk-based standards can only provide any meaningful benefit, if included as part of the existing self-implementing rule, otherwise compliance dates in the existing rule that the risk-based standards are designed to replace will have passed long before state CCR permit programs are approved by EPA or before EPA issues its own permits. The MSWFL rule provides ample legal basis and a model for EPA to incorporate similar risk-based criteria based upon site-specific factors into the CCR Rule, including among others, risk-based corrective action, alternative GWPS, waiver of groundwater monitoring requirements, and modification of the post-closure care period.

While the Proposed Rule relies in part on the MSWFL regulations in 40 C.F.R Part 258 as the basis for providing similar alternative risk-based performance standards in the CCR Rule. EPA notes the statutory basis for the MSWFL regulations and the CCR Rule differ and therefore the record for the MSWFL may not support a determination that certain risk-based performance

standards meet the RCRA protectiveness standard. The CCR regulations were based on RCRA section 4004(a), which requires an assurance, “there is *no reasonable probability* of adverse effects on health or the environment from disposal of solid waste at such facility.”¹⁸ Whereas, the MSWLF regulations authorize EPA to set standards “that are *necessary* for the protection of health and the environment” and to consider the facili[ties] “practical capabilities.”^{19,20} The protectiveness standard under the MSWLF regulations are more protective than the standards underlying the CCR Rule. The proposed alternative performance standards “were adopted based solely on a finding that they would protect human health and the environment, which is not appreciably different from the standards under RCRA.”²¹

a. EPA Should Allow Alternative Risk-Based GWPS

The Association supports allowing the use of alternative, risk-based GWPS, even in a self-implementing rule. There are well-established, protective approaches to groundwater monitoring for other solid waste programs such as the MSWLF regulations. EPA has a long history of establishing safe levels of exposure to chemicals in air, water, soil, and food. EPA has developed risk-based clean-up goals for groundwater to protect public health for decades under its Superfund Program. It is important to note that the majority of (if not all) site clean-ups/corrective actions under RCRA involve clean-up to risk-based values, not background. There is no material reason to treat the CCR program otherwise.

Remediation of Appendix IV constituents without an MCL to background levels is costly and resource intensive and does not provide any incremental health benefit. The current rule requires the use of stringent standards that are not based on the actual risk posed. The groundwater levels

¹⁸ 42 U.S.C. 6944(a).

¹⁹ 42 U.S.C 6949 (a).

²⁰ See 56 Fed. Reg. 50978, 50983 (October 9, 1991).

²¹ 83 Fed. Reg. 11597.

for these constituents are *below* established EPA health-based standards. Meaning the utility may be forced into onerous corrective action, even if contamination at a facility does not exceed an acceptable risk-based level.

EPA is proposing to allow the director of a state with an approved CCR program to establish an alternative, risk-based GWPS for Appendix IV constituents without an MCL. The Agency is also seeking comment as to whether an independent technical expert in a non-participating state can establish alternative, risk-based GWPS. Upon finalizing the 2015 CCR Rule, EPA declined to allow a qualified professional engineer to establish alternative GWPS, based upon EPA's determination that it was "inappropriate in a self-implementing rule, as it was unlikely that a facility would have the scientific expertise necessary to conduct a risk assessment and was too susceptible to abuse."²² The enactment of the WIIN Act negates this reasoning as the CCR Rule will be implemented either through a state permit program or an EPA permit program in non-participating states. Technical experts can establish a health-based level for constituents without an MCL, in the absence of a permitting authority. EPA will have the ability to directly enforce compliance with the CCR Rule. Without this revision, many impoundments will unnecessarily be forced to close based on the presence of constituents above background levels.

b. EPA Should Allow for Risk Based Corrective Action

EPA is proposing to allow a state director on a site-specific basis, to waive clean-up of Appendix IV constituents released to groundwater from a CCR unit under certain conditions: (1) the groundwater is contaminated by multiple sources and cleanup of the CCR release would provide no significant reduction in risk; (2) the contaminated groundwater is not a current or potential source of drinking water and is not hydrologically connected with waters to which the

²² 80 FR 21,405 (April 17, 2015).

part 257 Appendix IV constituents are migrate or likely to migrate in a concentration that would exceed the GWPS; or (3) remediation is not technically feasible; (4) remediation would result in cross-media impacts.²³ This provision is similar to the MSWLF regulations in § 258.57(e), which EPA has found to be protective of human health and the environment. Facilities should be allowed to waive corrective action under a self-implementing program, a state program or under an EPA administered program. EPA's enforcement authority under the WIIN Act in addition to existing requirements to post compliance demonstrations on a facility's publicly available website further guards against any potential abuse of a self-implementing program. It is for these reasons the Association supports the ability to waive groundwater corrective action if certain site-specific conditions are met.

In addition to waiving corrective action measures based on site-specific conditions, the final rule should allow source control measures to be discretionary. EPA notes its general reliance on the factual record developed in the Part 258 regulations to support this Proposed Rule. The Agency questions whether the Part 258 record supports source control under the CCR Rule, given CCR surface impoundments may pose different risks than landfills.²⁴ While it may be more challenging for some facilities to meet the criteria necessary to waive corrective action and source control measures, this should not preclude any facility from demonstrating that source control measures are not necessary to protect human health or the environment. Rather these determinations should be made on a case-by-case basis.

IV. EPA Should Modify the Non-Groundwater Release Provisions

The Association generally supports EPA's proposal to allow for limited corrective action procedures for minor non-groundwater releases that pose limited (or no) risk to human health

²³ 83 Fed. Reg. 11600.

²⁴ 83 Fed. Reg. 11601.

and the environment. However, some modification is necessary. EPA proposed to establish a subset of corrective action procedures that would apply to non-groundwater releases, including fugitive dust and various types of seeps and releases of a “catastrophic nature.”²⁵ EPA explains that the proposed limited corrective action process would generally apply to minor incidental releases.²⁶ However, these types of incidental non-groundwater releases are already appropriately covered under existing provisions of the CCR Rule. EPA should exclude fugitive dust releases and releases detected during the rule’s inspection or structural stability assessment requirements from the proposed definition of “non-groundwater releases.” Fugitive dust is already required to be included in the annual CCR fugitive dust control report per section § 257.80(c). The existing provision requires the adoption of “measure that will effectively minimize CCR from becoming airborne at the facility.”²⁷

During a facility’s structural stability assessment, owners/operators must remedy any “releases” identified during a weekly and annual inspection or structural stability assessment of a CCR landfill or surface impoundment as soon as feasible.²⁸ EPA notes, that “these types of releases (releases during inspection), can indicate concerns regarding the structural stability of the unit and that further assessment for structural stability is necessary, but they don’t typically constitute a substantial release of constituents to the environment in and of themselves.”²⁹ The Association maintains these types of releases (fugitive dust and releases during inspection) should not be considered “non-groundwater releases” subject to the Rule’s corrective action provisions at all, given that these types of releases are already adequately addressed by other provisions of the CCR Rule or other regulatory programs such as the Clean Water Act’s National

²⁵ 83 Fed. Reg. 1593.

²⁶ *Id.*

²⁷ § 257.80(b).

²⁸ 83 Fed. Reg. 11593.

²⁹ *Id.*

Pollutant Discharge Elimination Standards permit program. EPA has found these existing requirements to be protective of human health and the environment, and the Agency has failed to identify any unusual risks posed by these types of non-groundwater releases that would require a specific type of corrective action process.

V. Record Does Not Support Adding Boron to Appendix IV

The Association does not support the inclusion of boron in the Appendix IV constituents required to be monitored during the CCR Rule's assessment monitoring phase of the groundwater monitoring program. The rulemaking record does not support adding boron to Appendix IV. Neither the 2014 Risk Assessment (RA), nor the damage cases, provide support to this addition. EPA's primary reason for proposing to add boron to Appendix IV of Part 257 is that the 2014 RA shows that boron can pose developmental risk to both humans and ecological receptors.³⁰ USWAG retained a consultant to perform a technical review of EPA's 2014 RA.³¹ Here, we have summarized the results of the report and reference USWAG's detailed comment related to the consultant's report.³² In sum, the technical review found that EPA's 2014 RA does not support the inclusion of boron on Appendix IV because (1) there were no human health or ecological boron risks under any landfill or surface impoundment disposal scenario, except in the isolated case of flue gas desulfurization (FGD) disposal, which relied on conservative assumptions from only six sites, and included data from one of these six sites that did not appear to be representative of FGD waste which therefore biased the result high, and (2) there were only

³⁰ 83 Fed. Reg. 11589.

³¹ The technical consultant, Gradient Corporation prepared a report entitled, "Technical Considerations Regarding the Addition of Boron as an Appendix IV Constituent for Assessment Monitoring", April 13, 2018, (Gradient Boron Report).

³² USWAG Phase One Comments.

limited ecological risks associated with boron, which were associated solely with an overly-conservative FGD scenario and based on an outdated ecological risk benchmark.

Adding boron to Appendix IV will be the primary driver triggering corrective action at many sites. The CCR Rule requires sampling at the downgradient edge of the CCR unit to determine whether a GWPS has been exceeded. Due to the high mobility of boron, concentrations at the downgradient edge of CCR units are likely to be close to its porewater concentrations. Based on data used in the 2014 RA, the consultant found that 31 sites would have triggered corrective action based upon boron data supplied by 32 sites if background were used as the GWPS.

Another reason EPA provided for proposing to add boron to Appendix IV is that boron was identified as a contaminant of concern for approximately 50 percent of the damage cases. The damage cases reflect a range of waste types disposed in both surface impoundments and landfills. The mere mention of boron in damage cases does not justify its inclusion on Appendix IV, as a damage case does not involve a risk evaluation of the constituents detected on site. EPA notes that boron has a short travel time and is likely to reach potential receptors before other constituents.³³ This fact is why EPA included boron on Appendix III, as it is an effective indicator of whether a CCR unit may be leaking, but it is not a constituent of concern with respect to human health or ecological risk.

Moreover, adding boron to Appendix IV would increase remediation costs. The consultant's report indicates that remediating boron will require expensive technologies that will likely be implemented *in addition to* any remedy needed to remediate arsenic, a key human health driver for risk. There are few commercially available treatment technologies able to treat boron and those available are more expensive than technologies for other Appendix IV constituents. If

³³ 83 Fed. Reg. 11589.

added, alternative, risk-based GWPS for boron must be applicable, otherwise CCR impoundments will be forced to close based merely on the presence of boron at above background levels.

VI. EPA Should Amend the Alternative Closure Provisions to Allow for the Disposal of Non-CCR Wastestreams

The Association supports the modification of the alternative closure provisions in §257.103 to allow the consideration of alternative disposal capacity for non-CCR wastewaters and allow non-CCR wastewaters to be placed in impoundments that qualify for delayed closure. Impoundments otherwise subject to forced closure are needed to manage the non-CCR wastestreams generated during the production of power. This need arises, for example, when plants convert to dry handling of CCR. Absent the availability to manage non-CCR wastestreams, coal-fired power plants will have no option for the management of non-CCR wastewaters and will have to cease operation, triggering reliability concerns.

Without this amendment, the reserve margins established by the North American Electric Reliability Corporation (NERC) may be impacted if plants cease operation due to an inability to manage non-CCR wastestreams. NERC has the responsibility, expertise, and knowledge to establish the requisite reliability standards and reserve margins and the points at which unacceptable risks to reliable power delivery are triggered. EPA's proposed amendments to the alternative closure provision should apply to all six NERC regions to ensure all regions can meet applicable NREC reliability standards.

The new provision will ensure the rule continues to meet the Subtitle D protectiveness standard of ensuring "no reasonable probability of adverse effects on health or the

environment.”³⁴ Allowing units to continue operating to manage CCR and non-CCR wastestreams will be limited solely to the time necessary to construct and/or otherwise locate alternative disposal capacity and cannot exceed five years. During this limited time, corrective action to remediate groundwater will be implemented and power reliability will be preserved. If, on the other hand, forced outages were to occur, the potential for adverse risks to human health would be greater (*e.g.*, potential loss of power for emergency services, among other things) than the minimal risks, if any, of allowing these units to remain open for a limited period while undergoing corrective action.

VII. Use of CCR During Force Closure of a CCR Unit

EPA is proposing revisions to the use of CCR in a CCR unit closing for cause, for the limited purpose of constructing a final cover system.³⁵ The basis for this revision is that the CCR Rule strictly prohibits “placing CCR” in any unit required to close for cause. Further, the Rule does not distinguish between “placement” that might be considered “beneficial use” and placement that might be considered “disposal”.³⁶ The Proposed Rule preamble language suggests that owners/operators are unable to use CCR during closure, even if such use meets the beneficial use conditions.³⁷ The current CCR Rule *exempts* all beneficial use from *all* provisions of the CCR Rule. The CCR Rule provides, that “this subpart (Part 257) does not apply to practices that meet the definition of beneficial use of CCR.”³⁸ Upon finalization of the Proposed Rule, EPA should make clear that CCR can be used for closure (including ability to consolidate within multi-units

³⁴ See RCRA § 4004(a), 42 U.S.C. § 6944(a).

³⁵ 83 Fed. Reg. 11605.

³⁶ *Id.*

³⁷ Placement of CCR or use of CCR is allowed when the unit is closing under other provisions (§257.102).

³⁸ §257.50 (g).

operating as singular system) and allow the use of CCR for such purposes if beneficial use criteria in the rule are met.

The Association generally supports the use of CCR for grading and in the closure of impoundments subject to forced closure under §257.101. However, the use of CCR for grading and contouring as proposed should be allowed with modifications. The Proposed Rule would require CCR placed for the final cover system to be generated at the facility and be located at the facility at the time closure was initiated.³⁹ EPA should not require the CCR to be on-site at the time closure begins. Limiting this provision to on-site CCR, limits the benefit of remediating off-site ash disposal facilities. For example, a utility may plan to use ash from a closed landfill to close an impoundment, thus allowing the landfill site to be redeveloped. The utility could not take advantage of this redevelopment opportunity because the landfill is located off site.

The Proposed Rule outlines several conditions to allow grading and contouring for a final system cover. The Association believes EPA should allow utilities to modify the grading and contouring conditions based upon site-specific considerations. For example, a utility may be planning to close two impoundments located next to one another by removing a shared dike. In this case, the CCR would need to be placed outside the vertical plane of one impoundment and into the vertical plane of the neighboring impoundment. EPA should allow a qualified technical expert, even under the self-implementing program, to make modifications to all three grading and contouring conditions to account for site-specific considerations.

The Proposed Rule requests comment on whether the Agency should continue to “rely on its longstanding interpretation to allow the consolidation of CCR from units operating within multi-

³⁹ Proposed Rule Part 257.102(d)(4)(ii)(B)(1).

unit system, when the facility treats the system as a single unit for purposes of closure.⁴⁰ EPA has no reason to change its interpretation. Rather, EPA's 2014 RA concluded that consolidation would not pose a risk. The total waste depth was not a parameter driving risk (total thickness of the CCR disposal in a unit filled to capacity). Rather, consolidation of CCR from multiple units into one unit creates a smaller footprint and allows the unit to be closed in a faster timeframe due to the reduced area requiring waste stabilization and capping.

Finally, although not specifically raised in the proposed rule, an important related closure issue is the inflexible five-year deadline for completing closure of surface impoundments that are subject to the forced closure requirements under §257.101. In particular, these impoundments must complete closure within the five-year deadline established in §257.102(f) and do not get the benefit of extending the closure period if the CCR materials are being removed for the purpose of beneficial use under §257.102(e)(1),(2). The imposition of this requirement has the effect of preventing beneficial use of the CCR in the case of those impoundments for which there is an active program to recycle the CCR, but that program cannot be fully implemented within the five-year closure period. Such an outcome is contrary to RCRA's overarching goal of conserving natural resources through the beneficial reuse of waste materials whenever possible. Nor are these prescriptive closure deadlines necessary to protect human health and environment. Any risks to human health and the environment can be mitigated through the current CCR Rule requirements for groundwater monitoring and corrective action that would apply during the extended closure period. Furthermore, this approach would have the counterproductive environmental effect of precluding the clean closure of the impoundments or at least greatly reducing the impacted area by arbitrarily cutting short the time that is available to remove the

⁴⁰ 83 Fed. Reg. 11607.

CCR from the impoundments. For these reasons, the Association requests that EPA remove the current inflexible five-year deadline for completing closure of impoundments undergoing forced closure. In its place, EPA should establish rules that allow for the extension of the closure period in the case of those impoundments for which the CCR materials are being removed for the purpose of beneficial use under an active beneficial use program.

VIII. Conclusion

The Association appreciates the opportunity to provide comments on the Phase One Proposed Rule and requests that EPA move quickly to finalize this rulemaking. The WIIN Act has paved the way for EPA to incorporate the proposed risk-based performance standards, which are consistent with RCRA subtitle D protectiveness standards. Due to rapidly approaching compliance deadlines in the CCR Rule, it is essential that EPA extend the compliance deadlines as contemplated in the Proposed Rule, allowing facilities to make investments based on risk, as opposed to implementing standards that are one-size fits all.

The Association looks forward to continued cooperation and participation with the Agency on this proposed rulemaking, and during the Phase II rule development. If you have questions regarding our comments, please contact Ms. Carolyn Slaughter at 202-467-2943 or cslaughter@publicpower.org.

Sincerely,

A handwritten signature in black ink that reads "Carolyn Slaughter". The signature is written in a cursive, flowing style.

Carolyn Slaughter
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