April 17, 2020

Honorable Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Office of Resource Conservation and Recovery Materials Recovery and Waste Management Division
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Attn: Docket No. EPA-HQ-OLEM-2019-0173
[Submitted electronical via: www.regulations.gov]

RE: Comments of the American Public Power Association on the Environmental Protection Agency's Proposed Rule on the Hazardous and Solid Waste Management System: Disposal of CCR: A Holistic Approach to Closure Part B: Alternative Demonstration for Unlined Surface Impoundments; Implementation of Closure (85 Fed. Reg. 12456 (March 3, 2020)

Dear Administrator Wheeler:

The American Public Power Association (APPA or Association) appreciates the opportunity to comment on the Environmental Protection Agency's (EPA or Agency) proposed rule titled the "*Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals (CCR): A Holistic Approach to Closure Part B: Alternative Demonstration for Unlined Surface Impoundments; Implementation of Closure*" (Proposed Rule or Part B Proposal).[1] EPA is proposing these rule changes to enhance and improve upon the current requirements and procedures for closing CCR disposal facilities that were established by the 2015 federal CCR rule.[2] APPA is generally supportive of the proposed revisions and supports the Agency's efforts to finalize the Part B Proposal as quickly as practicable.

APPA 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. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

[1] 85 Fed. Reg., at 12,456 (March 3, 2020).
[2] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg., 21,302 (April 17, 2015) (2015 CCR rule).

I. Executive Summary

Association members own and operate CCR disposal units subject to the requirements of the federal CCR regulations at 40 C.F.R. Part 257, Subpart D, or, if approved by the EPA, the requirements of a state CCR permit program or other system of prior approval. EPA's Proposed Rule seeks to (1) allow facilities to apply to continue to operate with an alternative liner for existing CCR surface impoundments; (2) allow the use of CCR for purposes of closing a CCR unit subject to forced closure; (3) provide an additional closure option for units that are closed by removal of CCR, but cannot complete groundwater corrective action in the CCR rule's timeframe; and (4) establish new requirements for annual closure progress reports. APPA generally supports EPA's proposed changes and offers recommendations for specific modifications. EPA's proposed changes are appropriate given the legal developments and new information provided to the Agency since the issuance of the 2015 CCR rule. Summarized below are our key positions and recommendations:

- APPA supports the continued use of CCR to close surface impoundments. While the 2015 CCR rule already permits this activity, EPA should clarify in this rulemaking that the current CCR rule allows for the beneficial use of CCR to close CCR units subject to forced closure. APPA also supports using CCR to close units under certain conditions in an approved closure plan.
- APPA supports the new alternative closure by removal provision, allowing facilities to complete corrective action during the post-closure care period. However, we recommend the final rule eliminate the requirement to implement the corrective action remedy prior to completing closure as groundwater conditions are likely to change once the CCR is removed of the surface impoundment.
- APPA supports the proposed requirements to provide annual closure progress reports and to provide the date on which closure activities commenced.
- APPA supports the alternative liner demonstration process. The use of site-specific data appropriately supports the continued operation of unlined impoundments in accordance with the Resource Conservation Recovery Act (RCRA) subtitle D protectiveness standard.

The Association is a member of the Utility Solid Waste Activities Group (USWAG) and supports their legal and technical comments on the Proposed Rule.

II. Use of CCR in Units Subject to Closure for Cause

On March 15, 2018, EPA proposed to revise the 2015 CCR rule to allow the use of CCR during certain closure situations for CCR units closing for cause under 40 C.F.R § 257.101.[3] According to EPA, the basis for the March 2018 proposed revision is that the federal CCR rule strictly prohibits "placing CCR" in any unit required to close for cause. APPA's comments on the March 2018 proposal objected to EPA's interpretation prohibiting the placement of CCR in any unit required to close for cause.[4] Rather, the federal CCR rule does not distinguish between "placement" that might be considered "beneficial use" and placement that might be considered "disposal". The 2015 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."[5] Thus, there is no prohibition on using CCR to close impoundments or landfills subject to forced closure, provided such use is in accordance with the rule's beneficial use criteria. In the Association's March 2018 comments, we urged the Agency to make clear that CCR can be used for closure and to allow the use of CCR for such purposes if the beneficial use criteria in the CCR rule are met.

A. Beneficial Use of CCR Should be Supported

The one of the primary goals of RCRA is to conserve natural resources though beneficial reuse of material. EPA's 2000 Regulatory Determination determined the following:

> "national regulations of [CCRs] under Subtitle C or Subtitle D is not warranted for any of the other beneficial use of coal combustion waste. We have reached this decision because: (a) We have not identified any other beneficial uses that are likely to present significant risks to human health or the environment; and (b) no documented cases of damage to human health or the environment have been identified. Additionally, we do not want to place any unnecessary barriers on the beneficial uses of coal combustion

[3] 83 Fed. Reg., at 11,585 and 11,605 (March 15, 2018) (Phase One Proposal).
[4] *See* Docket No. EPA-HQ-OLEM-2017-0286-2010, 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 at 16.
[5] § 257.50 (g).

> wastes so they can be used in applications that conserve natural resources and reduce disposal costs."[6]

The use of CCR materials for closure avoids the consumption of virgin materials and the energy required to produce, refine, and transport those materials to CCR units. Additionally, some sites are limited in resources and do not have reasonable access to the virgin materials that could be used to close units. Further, the use of beneficial material facilitates the ability of a CCR unit to closure expeditiously and reduces risk more quickly.[7] Therefore the Agency should encourage the beneficial use of CCRs to close CCR units for cause.

B. EPA's Proposed Changes to Using CCR for Closure

EPA has not finalized the proposed March 2018 revision allowing for the use of CCR during closure. Instead, EPA is seeking comment on two additional options allowing the use of CCR to close units undergoing forced closure. Under the first option, CCR could be used for closing a CCR surface impoundment subject to forced closure provided that such use is conducted under an approved closure plan.[8] The second option would allow an owner/ operator to use CCR to close a unit undergoing forced closure provided the use meets the beneficial use conditions and closure performance standards.[9] APPA does not object to the additional options, however, modifications are necessary.

1. Option One-Closure Under an Approved Closure Plan

Under option one, EPA outlines several compliance conditions. APPA has concerns with the condition placed on the time to complete closure of a unit when using CCR. Under this condition the time limit to place CCR cannot exceed the time needed to close the unit with soil or borrow material. The need for this condition is unclear, given all facilities are subject to specified closure timeframes regardless of the material used for closure, and the basis for an extension to these deadlines is not tied to the type of materials used to close the unit.[10] Further, it is unclear how compliance would be evaluated. The CCR regulations require closure by applicable deadlines. A myriad of factors contribute to the speed in which a unit is closed least of which is the type of material used.

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[6] RCRA§ 8002(n) (42 U.S.C §6982(n).
[7] 85 Fed. Reg., at 12,462.
[8] Proposed §257.102(d)(4).
[9] 85 Fed. Reg. at 12,466. This option is outlined in the preamble of the proposed rule and not in the regulatory text.
[10] §257.102(f)(2).

The second condition of concern pertains to the volume of CCR that would be placed during closure. The condition seeks to place an arbitrary limit on the volume of soil or borrow material that otherwise would be used for a cover system. This condition would prevent facilities from fully consolidating their CCR units during closure. EPA should adopt an approach that allows for true consolidation of CCR units which mitigates longer-term risks and reduces the amount of time needed to close a unit.

Finally, the condition to demonstrate how the placed CCR would be used in a CCR unit will achieve the closure performance standards specified in 40 C.F. R. § 257.102(d) seems duplicative.[11] Plainly, CCR will only be used for closure when units are closing with CCR in place under 40 C.F.R. § 257.102(d). This provision sets forth a general performance standard, as well as criteria for the installation of the cap system over the closed unit. The existing rule already requires owners/operators to describe how they will close in accordance with the rule. Specifically, the rule requires the contents of a closure plan must include, among other things, a narrative description of "how the CCR unit will be closed in accordance with this section," which explicitly includes the performance standards set forth in 40 C.F.R. § 257.102(d) for units closing in place.[12]

2. Option Two-Closure Under Beneficial Use Conditions

Closure using option two would allow an owner/operator to use CCR to closure a unit undergoing forced closure, provided it meets the beneficial use conditions. Under this option, the CCR unit would remain subject to all applicable CCR rule requirements, such as the closure performance standards. In addition, the owner/operator would be required to revise the unit's closure plan to document how the CCR would be used to support closure of the unit, including how the beneficial use criteria are met. The CCR rule's beneficial definition comprises of four use criterions. EPA notes it recently issued a proposed rule to seek comment on revising the fourth beneficial use criterion.[13] In that proposal, EPA is seeking to eliminate the mass based numerical threshold of 12,400 tons and replace it with specific location-based criteria. The Part B Proposed Rule seeks comment on whether the environmental demonstration required in the

[11] 85 Fed. Reg., at 12,465.
[12] See 40 C.F.R.§ 257.102(b)(1)(i).
[13] *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals (CCRs) From Electric Utilities; Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles, Proposed Rule, 84 Fed. Reg. at 40,353 (August 14, 2019) (Beneficial Use Proposal).

fourth beneficial use criterion should be required in all cases when CCR is used to close units' subject to forced closure, regardless of the amount of CCR used.[14] APPA has concerns with this proposed requirement. The rulemaking record does not support the addition of the proposed condition. As far as Association members are aware there is no information suggesting affected sources are not following the fourth beneficial use criterion. Further, the fourth beneficial use criterion is only triggered for unencapsulated uses greater than 12,400 tons. The Agency set this threshold in the CCR rule based on risk from large concentrations of CCR placed in a single location, as documented in the 2014 Risk Assessment. The Agency needs to provide the appropriate record evidence that CCR quantities of less than 12,400 ton presents a risk.

a) The Five-Year Closure Period Should be Extended for Beneficial Use.

An important related closure issue of concern to APPA is the inflexible five-year deadline for completing closure of surface impoundments that are subject to the forced closure requirements under §257.101. 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. Many of the unlined surface impoundments subject to forced closure under the *USWAG* decision (which exceeds 500 impoundments) are not violating any groundwater protection standard for an Appendix IV constituent and therefore are not having any adverse groundwater impacts.[15] Furthermore, even in the case of those unlined impoundments that may happen to be exceeding a groundwater protection standard, any potential risk to human health and the environmental can be effectively mitigated through the current CCR

[14] 85 Fed. Reg., at 12,468.

[15] *Utility Solid Waste Activities Group, et al. v. EPA*, 901 F.3d 414, 449 (D.C. Cir. 2018), (*USWAG* decision). The U.S. Court of Appeals for the D.C. Circuit held that unlined and clay lined CCR surface impoundments pose a "reasonable probability of adverse effects on health or the environment" and therefore constitute prohibited "open dumps" under RCRA subtitle D. The *USWAG* case vacated 40 C.F.R § 257.101 (which allowed unlined CCR impoundments to operate until a leak was detected) and 40 C.F.R § 257.71(a)(1)(ii) (which defined clay-lined impoundments as "lined") and remanded those portions of the 2015 CCR rule to EPA for further rulemaking consistent with the court's opinion.

rule requirements for groundwater monitoring and corrective action that would apply during the extended closure period. Finally, 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 CCR from the impoundments. For these reasons, APPA 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.

III. Alternative Option for Closure by Removal

EPA is proposing a new closure option for CCR units closing by removal of CCR, under which a facility may complete its groundwater corrective action during the post closure care period following closure of the unit.[16] APPA supports this alternative option as it allows facilities to undertake closure by removal in situations where groundwater corrective action cannot be completed within the timeframes for closure required under the current rule.

Under the 2015 CCR rule, an owner/operator must certify closure by removal is complete when all CCR has been removed from the unit and that groundwater corrective action has been completed and demonstrate that there are no exceedances of any groundwater protection standards for constituents on Appendix IV.[17] The CCR rule also establishes deadlines to initiate and complete closure activities within five years and subsequent extensions based a demonstration that it is not feasible to complete closure within the timeframes due to factors beyond the facility's control.[18] This approach has the potential to cause compliance problems at certain sites because groundwater corrective action can take substantially longer to complete than the closure timeframes allowed under the rule (i.e., five years, with possible extensions based on the size of the impoundment for impoundments 40 acres or smaller, one two-year extension is available; for impoundments greater than 40 acres, five two-year extensions are available).[19]

[16] 85 Fed. Reg., at 12,469.
[17] §257.102(c).
[18] §257.102(f)(2)(i).
[19] §257.102(f).

Thus, some owners/operators that want to close a unit by removal are faced with the possibility that they will be unable complete closure in compliance with the CCR rule—a possibility that may discourage those facilities from closing CCR units by removal.

Under the newly proposed closure alternative a facility could certify that a unit has been closed by removal upon: (1) completion of all removal and decontamination activities (except for groundwater corrective action) and (2) implementation of the remedy. Thereafter, the CCR unit would be subject to post-closure care requirements until corrective action is achieved. APPA supports this proposed option for closure by removal but suggests EPA consider that in some cases it may be premature to require a facility to have to implement a remedy during the closure process. Groundwater conditions are likely to change after the CCR removal process is complete. EPA acknowledges in the Proposed Rule preamble that corrective action "could take years or decades to complete."[20] Evaluation and remedy selection may be more appropriate only once the CCR removal activities are complete. APPA recommends the final rule eliminate the requirement to implement the remedy prior to completing closure. Further, the current rule already requires corrective action "as soon as feasible" and to implement the remedy within 90 days of selecting the remedy.[21]

A. New Closure by Removal Regulatory Text Could be Misinterpreted

EPA is proposing to add new regulatory text to the existing closure by removal option under §257.102(c)(1). While EPA is not proposing any material changes, the proposed language establishes more specificity around the performance standards that must be met when closing a CCR unit by removal. The regulatory text read as follows:

> "An owner or operator closing a CCR unit by removal of CCR must follow the procedures specified in either paragraph (c)(1) or (c)(2) of this section. Closure by removal activities include removing or decontaminating all CCR and CCR residues, containment system components such as the unit liner, contaminated subsoils, contaminated groundwater, and CCR unit structures and ancillary equipment."[22]

The inclusion of this regulatory text is not necessary and could potentially cause uncertainty concerning the new meaning of the regulatory text. The existing rule does not contain this degree of specificity, including the reference to the removal of contaminated groundwater. The

[20] 85 Fed. Reg., at 12,469.
[21] 40 C.F.R. § 257.97(a) and § 257.98(a).
[22] 85 Fed. Reg., at 12,477, Proposed §257.102(c).

regulatory language could be misinterpreted, especially given that closure by removal is achieved when the applicable groundwater protection standards are achieved at the edge of a unit boundary. While EPA's intent is not to change the closure by removal requirements, the addition of such terms as "CCR residuals" and statements in the preamble, requiring owners/operators to "remov[e] any fugitive dust (CCR) discovered outside the waste unit boundary" appears to greatly expand the closure by removal standards.[23] The 2015 CCR rule requires removal or decontamination of areas impacted by releases of CCR and requires facilities to have a fugitive dust plan.[24] APPA recommends not including the revised regulatory text in the final rule.

IV. Closure Progress Reports

EPA is proposing two new requirements related to closure that address a "potential significant" time gap in reported information between when a facility posts the notice of intent to close a unit and the notification certifying that closure of the unit is completed.[25]

The Part B Proposal would require owners/operators to include the actual date the facility commenced closure of the unit in the notification of intent to close.[26] The second requirement proposes that owners/operators provide annual closure update reports documenting the progress that facilities have made in closing a CCR unit. Reports would be prepared by January 31 of each year and would be posted on the publicly available CCR website. APPA is generally supportive of adding the closure progress report requirements to the CCR rule. These reports would offer another layer of transparency to the activities occurring at a facility. Further these new reporting requirements are in keeping with public power's tradition of customer service. However, APPA recommends EPA clarify in the final rule how the progress reporting requirements apply to inactive impoundments that have not yet initiated closure. Some owners/operators of inactive impoundments submitted a notice of intent to close under, §257.100 a provision that was subsequently vacated by the D.C. Circuit. After that provision was vacated, some of those inactive impoundments continued operating (i.e., receiving non-CCR waste). Thus, clarification is needed as to how the new requirement should apply to those units.

[23] 85 Fed. Reg., at 12,469-12,470.
[24] 40 C.F.R. § 257.102 (c).
[25] 85 Fed. Reg., at 12,471.
[26] §257.102(g).

V. Alternative Liner Demonstration

The Part B Proposal seeks to create a process for EPA or the Participating State Director to approve an alternate liner for CCR surface impoundments. APPA is supportive of creating a process for facilities to submit an alternate liner demonstration to support the continued operation of individual unlined surface impoundments that can demonstrate no reasonable probability of adverse effects on human health and the environment. While we recognize the number of public power utilities able to take advantage of the proposed alternative liner demonstration is limited, the provision seeks to address the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) ruling in *USWAG*. The D.C. Circuit held that certain portions of the CCR rule were inconsistent with RCRA § 4004(a). As a result of the ruling, some CCR surface impoundments would have to retrofit or close even though those units are not impacting the environment. Considering the *USWAG* decision, EPA's Part B Proposal is appropriate and necessary.

The *USWAG* decision does not prevent the Agency from developing a new rulemaking record to support a site-specific demonstration that the design of a particular impoundment is equivalent to a composite liner system.[27] The 2015 CCR rule did not take into account the fact that site-specific characteristics can lower the risk posed by "unlined" units. Rather, the data available in the 2014 Risk Assessment, (i.e., basis for the 2015 CCR rule) was sufficient to identify potential risk on a national scale and could not be used to draw conclusions about any individual impoundment.[28] Therefore, EPA was not able to draw conclusions about individual units or regions around the country. Comments submitted by USWAG on the Part B Proposal illustrate several examples of certain unlined CCR surface impoundments that operate safely based on site-specific circumstances.[29] Those units and other similar units should not be forced to close or install expensive liner systems if they can demonstrate underlying soils are equivalent or superior to the performance of the composite liners required under the 2015 CCR rule.

A. Timeline to Finalize the Alternative Liner Demonstration is Critical

The deadline for facilities to initiate closure of unlined impoundment is in flux. EPA recently proposed to amend the deadlines for facilities to initiate closure of "unlined" CCR

[27] §257.71(c) and § 257.72(c).
[28] 85 Fed. Reg., at 12,459.
[29] USWAG Comments on the Part B Proposed Rule at 25-26.

surface impoundments to August 23, 2020, in the Part A Proposed Rule.[30] Whatever deadline is ultimately selected, EPA must finalize the alternative liner demonstration provisions of the Part B Proposal in enough time for facilities to be able to use this option. If the final alternative liner demonstration is not published in the *Federal Register* at least 30 days before the deadline to initiate closure, facilities may not have enough time to submit an alternative liner demonstration application and toll the deadline to initiate closure.

B. Alternative Liner Demonstration a Two-Step Process

EPA is proposing to establish a two-step alternative liner demonstration process, requiring an initial application followed by the submission of the alternative liner demonstration. Under step one, an owner/operator must submit a letter to EPA declaring their intent to submit a demonstration. The letter would include documentation that the facility is complying with all applicable subparts.[31] The initial application would be due 30 days from the effective date of any final Part B rule. EPA would then evaluate the information and determine whether the surface impoundment is eligible to submit an alternative liner demonstration within 60 days of receiving a complete application.[32] However, no additional information will be accepted after the deadline to submit the application. Under step two, an owner/operator would submit a full alternative liner demonstration with certain information (1) characterizing the site hydrogeology and (2) characterizing potential infiltration though the liner and underlying soils.[33] APPA supports the proposed alternative liner demonstration provision, but offers the following recommends to ensure the benefits of the provision can be fully utilized.

1. EPA should clarify what constitutes a "complete" application under step one.

EPA must distinguish between a "complete application" and a substantive determination of the eligibility of a facility to submit a liner demonstration. A complete application depends on whether a facility has submitted the necessary pieces of information to EPA. A complete application is not based on a judgment as to whether a unit is eligible to submit an alternative liner demonstration. EPA should make this clear. Further, the final rule should identify the

[30] *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure, 84 Fed. Reg., at 65,941 (December 2, 2019) (Part A Proposed Rule).
[31] 85 Fed. Reg., at 12,459.
[32] *Id.*
[33] *Id*.

information needed to make an application complete such as a certification from the utility that it is in compliance with all applicable subparts. In addition to clarifying when an application is complete, EPA should allow a facility to provide additional information following the submission of a complete application after the 30-day submission period. This request would not deem the initial application to be "incomplete" so long as the additional information is provided to EPA within the Agency's 60-day review period.

C. Alternative Closure Under Part 257.103 Must Still be an Option for Units Unable to Use the Alternative Liner Demonstration

If EPA or the Participating State Director determines that a unit is not eligible or is denied the ability to use the proposed alternative liner demonstration, the owner/operator of the unit must cease receipt of waste and initiate closure within six months.[34] However, the proposal allows facilities to obtain alternative capacity in accordance with the alternative closure provisions under §257.103. APPA supports the applicability of the alternative closure provisions in §257.103 to facilities that apply for but are unable to meet the requirements of an alternative liner application or demonstration. APPA recommends EPA clarify that facilities that submit an alternative liner application do not need to "seek alternative capacity" during the application review and demonstration submission period. As proposed in the Part A rule, an owner/operator need only show continued efforts are being made to obtain alternative disposal capacity or that it was infeasible to complete the measures necessary to obtain alternative disposal capacity by November 30, 2020.[35]

VI. Conclusion

APPA appreciates the opportunity to submit comments on the Proposed Rule and looks forward to EPA finalizing the rule as soon as practicable. As discussed above, the proposed amendments to the 2015 CCR rule are appropriate and reasonable considering the *USWAG* decision and new information the Agency has received. If you have questions regarding these comments please, contact Ms. Carolyn Slaughter (202) 467-2900 or email CSlaughter@PublicPower.org.

[34] Proposed §257.71(d)(2)(vi).
[35] *See* 84 Fed. Reg., at 65,962.

Sincerely,

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